The Banyamulenge and Ethnocentric Nationality in the Congo:

A Litigation Strategy for Peace

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Thesis Statement

In order to dismantle institutionalized tribalism in the Congo – which has fostered recurring war and armed conflict – its lynchpin of ethnocentric citizenship must be removed; this can be accomplished peacefully, through litigation to change the Constitution and nationality laws of the DRC which violate international human rights law.

Abstract

The Banyamulenge are a minority ethnic group living in the eastern part of the Democratic Republic of the Congo, concentrated on the High Plains of Itombwe in South Kivu Province. They are pastoral cattle herders, of Tutsi ethnicity, whose nomadic ancestors migrated to Congo many generations ago from present-day Rwanda-Burundi. For this reason, they are considered non-indigenous to the Congo. Due to the Congolese law of nationality by birth being grounded in ethnicity, their Congolese nationality has been and is subject to political manipulation. The Congolese state has, in the latter half of the twentieth century, alternatively granted, withdrawn, and reinstated their Congolese citizenship. The issue was at the center of the great Congo Wars of 1996-2003, and continues to provide grist for the mill of renewed armed conflict. Fundamentally, the basic Congolese nationality law perpetuates a legal framework for racial division which does nothing to hinder but only enables malicious sympathies which tend toward exclusion, persecution, expulsion and genocide. To address this existential flaw, this thesis describes how the primacy of ethnicity in the Congolese law of nationality by birth is incompatible with international human rights law, and proposes a strategy to litigate the issue before national, regional and international courts, with the goal of changing the Congolese Constitution and law on nationality.

Outline

About the Author

David A. Buzard (LL.M. Human Rights, Regent University, 2021; J.D., Tulane University, 1990; B.A. Linguistics, Northwestern University, 1984), is an attorney practicing before the Virginia Bar, and Commander, Judge Advocate General's Corps, U.S. Navy Reserve (Retired). His last recall to active duty, in October 2010, took him to the Democratic Republic of the Congo. There, he spent the next eight years advising the Congolese armed forces in matters of military justice and security sector reform, on behalf of the U.S. Department of State as a contractor after retiring from the naval service. This experience inspired him to study International Human Rights Law after his return to the United States in December 2018. Nothing whatsoever in the present work is to be considered representative of the views of any component of either the United States or Congolese governments; all views expressed are solely the author's unless otherwise indicated.

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I. INTRODUCTION

Only two decades ago, nearly four-million human beings perished during seven official years of war, from 1996 to 2003, in the African nation-state known as the Democratic Republic of the Congo.[1] This mass bloodshed, on a magnitude of the Holocaust, was primed two years earlier by the slaughter of over eight-hundred-thousand human beings in the space of less than four months, during the Hutu-on-Tutsi genocide in neighboring Rwanda, the size of Massachusetts.[2] Lower-levels of bloodshed from armed conflict continue to this day, nearly twenty years later, and threaten to explode anew.[3] Dubbed "Africa's World War" for having engaged ten African nation-states besides the Congo, the many accounts of its particular causes and participants' motives are wide-ranging.[4] Many of those accounts are simplistic, and some are sensationalist, running the gamut from a war of liberation to topple the kleptocratic strongman Mobutu Sese Seko; to pursuit by the Rwandan Tutsi army of the genocidal Hutu hoard which had fled into Zaire (as Mobutu had renamed the Congo in 1971); even to an

[1] There are several different estimates of the total death toll during the Congo Wars, ranging from 200,000 to 3.8 million. THOMAS TURNER, THE CONGO WARS: CONFLICT, MYTH & REALITY 1-3 (2007).
[2] The most inclusive conservative accounting renders 3.8 million, hence "half a holocaust." *Id*. (quoting and citing Nicholas Kristoff, [*Germany, Congo, Darfur, Rwanda*,] NEW YORK TIMES [(May 3, 2008, 10:42 AM), https://kristof.blogs.nytimes.com/2008/05/03/germany-congo-darfur-rwanda/]). *See also* GÉRARD PRUNIER, AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE (2009).
[3] *See generally* KRIS BERWOUTS, CONGO'S VIOLENT PEACE: CONFLICT AND STRUGGLE SINCE THE GREAT AFRICAN WAR (2017); SÉVERINE AUTESSERRE, THE TROUBLE WITH THE CONGO: LOCAL VIOLENCE AND THE FAILURE OF INTERNATIONAL PEACEKEEPING (2010).
[4] *See generally* PRUNIER, *supra* note 2; TURNER, *supra* note 1; MOHAMED EL HACEN OULD LEBATT, FACILITATION DANS LA TOURMENTE: DEUX ANS DE MÉDIATION DANS L'IMBROGLIO CONGOLAIS [FACILITATION AMIDST THE TORMENT: TWO YEARS OF MEDIATION WITHIN THE CONGOLESE IMBROGLIO] (2005). *See also* René Lemarchand, *Reflections on the Recent Historiography of Eastern Congo*, 54 THE JOURNAL OF AFRICAN HISTORY 417 (2013). The ten other African nation-states were: Rwanda, Uganda, Burundi, Zimbabwe, Angola, Namibia, Chad, Soudan, Libya, and the Central African Republic. OULD LEBATT, *supra* at 21 n.1.

apocalyptic battle between the Nilo-Hamitic and Bantu races[5] for dominance of the Congo River Basin and the African continent.[6]

Be these accounts as they may, one thing *is* certain: a central role is played throughout the conflict by an ethnic minority known as the Banyamulenge, be that role one of victim, protagonist, pawn, or scapegoat.[7] Their history in Congo since the mid-twentieth century has been one of persecution, if not genocide,[8] periodically perpetuated upon them by surrounding militias formed from other ethnic groups. It has also been a history of their reaction in self-

[5] A "corrosively racial notion." LOUISE MUSHIKIWABO, RWANDA MEANS THE UNIVERSE: A NATIVE'S MEMOIR OF BLOOD AND BLOODLINES 237 (2006). *See also* ISIDORE NDAYWEL È NZIEM, HISTOIRE GÉNÉRAL DU CONGO: DE L'HÉRITAGE ANCIEN À LA RÉPUBLIQUE DÉMOCRATIQUE [GENERAL HISTORY OF THE CONGO : FROM ANCIENT HISTORY TO THE DEMOCRATIC REPUBLIC] 471 n.49 (1998); MANASSÉ (MÜLLER) RUHIMBIKA, LES BANYAMULENGE (CONGO-ZAÏRE) ENTRE DEUX GUERRES [THE BANYAMULENGE (CONGO-ZAIRE) BETWEEN TWO WARS] 22 (2001); BIGINA MFASHINGABO, *Mythe Nilo-Hamite Mue à la Théorie de la Balkanisation [The Nilo-Hamite Myth Morphs into the Theory of Balkanization]*, MILLE COLLINES INFOS (Nov. 12, 2020), https://millecollinesinfos.com/index.php/2020/11/12/ mythe-nilo-hamite-muee-a-la-theorie-de-la-balkanisation.

The Tutsi are mythically reputed to have descended from Noah's son Ham (*Genesis* 9:18, hence 'Hamitic') through Ham's son Egypt (*Genesis* 10:6) whose issue migrated up the Nile (hence 'Nilotic') into the Great Lakes Region, driving their herds of long-horn cattle before them, whose distant cousins through Ham's son Cush (*Genesis* 10:7) are found throughout the Horn and East Africa (i.e., Eritrea, Ethiopia, Somalia, and the Masai in Kenya and Tanzania (though the latter may also be Nilotic)). *See, e.g.,* Nigel Eltringham, *'Invaders Who Have Stolen the Country': The Hamitic Hypothesis, Race and the Rwandan Genocide*, 12 SOCIAL IDENTITIES 425 (2006); Yochannan Bwejeri, *Havila and the Tutsi Hebrews*, KULANU, https://kulanu.org/ communities/tutsi/havila-tutsi-hebrews/ (last visited Sep. 28, 2020). Note: All references to the Bible throughout this thesis are to the New Revised Standard Version, unless otherwise indicated.

The Bantu peoples, which include the Hutu, are comprised of hundreds of linguistically-related ethnic groups, some say derived from an antediluvian base, originating in Sub-Saharan Africa, found throughout West/Central and Central Africa, across the Great Lakes and down into Southern Africa. *See generally Bantu Peoples*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bantu_peoples (last visited Nov. 2, 2020); Peter Kondwani Msaka, Presentation at University of Malawi, Chancellor College: A Synchronic Approach to the Chichewa Nominal Classification System (Dec. 8, 2016), https://www.cc.ac.mw/events/Presentation-A-synchronic-approach-to-the-Chichewa-nominal-classification-system-30-11-2016 (ante-diluvian linguistic root).

[6] *See*, *e.g.*, Lars-Christopher Huening, *Making Use of the Past: the Rwandophone Question and the 'Balkanisation of the Congo'*, 40 REV. OF AFR. POL. ECON. 13, 27 (2013); RENÉ LEMARCHAND, THE DYNAMICS OF VIOLENCE IN CENTRAL AFRICA 49-68 (2009); PETER GESCHIERE, THE PERILS OF BELONGING: AUTOCHTHONY, CITIZENSHIP, AND EXCLUSION IN AFRICA AND EUROPE, 119 & 242 n.29 (2009) ("Scarcely any academic would dare to defend this thesis today (the whole idea of a Nilotic invasion is severely contested), but the notion still plays a major role in the political competition between groups throughout this area.").

[7] *See* Nelson Alusala, *Boarder Fragility and the Causes of War and Conflict in the Democratic Republic of the Congo, in* AFRICAN BORDERS, CONFLICT, REGIONAL AND CONTINENTAL INTEGRATION 89 (Inocent Moyo & Christopher Changwe Nshimbi eds., 2019); *see generally* discussion in section II, *infra*.

[8] Rukumbuzi Delphin Ntanyoma, *Genocide Warning*: *The Vulnerability of Banyamulenge 'Invaders', ISS Working Paper Series/General Series (Vol. 649),* GENOCIDEWATCH: ERASMUS UNIVERSITY (Oct 10, 2020), https://www.genocidewatch.com/single-post/genocide-warning-the-vulnerability-of-banyamulenge-invaders.

defense to that persecution, as well as the assistance provided by their Tutsi brethren from the post-genocide Rwandan army. Rwanda proclaimed defense of the Banyamulenge as one of its reasons for invading,[9] and resentment runs deep throughout Congolese society for the immense suffering caused by the war.[10] Moreover, mainstream Congolese society repeatedly voices its suspicion of the Banyamulenge community, believing that it seeks to secede from the DRC under the guise of self-determination with the support of a Tutsi-dominated Rwanda harboring irredentist motives.[11] The refrain "*non à la balkanisation!"* ["No Balkanization!"][12] resonates among the polity.[13]

The Banyamulenge are pastoralists, cattle-herdsmen, the descendants of nomads who migrated from elsewhere, and hence are considered not "indigenous" to the Congo. For this reason, those with competing claims over their land or covetous of their cattle brand them as

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[9] NDAYWEL È NZIEM, *supra* note 5, at 794. *See also infra* note 47.

[10] "For many, the one layer of memory which eclipses all others is the auxiliary role played by the Banyamulenge" in the Rwandan Army's heavy-handed dominance of the Kivus during the war. LEMARCHAND, DYNAMICS OF VIOLENCE, *supra* note 6, at 237. What Stephen Jackson wrote in 2007 still holds true:

> Most ordinary Congolese still hold the Banyamulenge to blame for the great suffering that the country has undergone since 1998, seeing them as a "Trojan Horse" for Rwandan rapine and irredentism against the national territory, contributing to the enormous present polarization around the "nationality question."

Stephen Jackson, *Of "Doubtful Nationality": Political Manipulation of Citizenship in the D.R. Congo*, 11 CITIZENSHIP STUDIES 481, 488 (2007).

[11] Such suspicion finds its justification in both the Rwandan President's having proclaimed, early in the war, that much of eastern Congo historically belongs to Rwanda, and also the persistence of a "Greater Rwanda" narrative in Rwandan cultural and political discourse which has been used "to legitimize military and political interventions in the DRC." Gillian Mathys, *Bringing History Back In: Past, Present, and Conflict in Rwanda and the Eastern Democratic Republic of Congo*, 58 J. AFR. HIST. 465, 470-475 (2017). *See also* LEMARCHAND, *supra* note 6, at 64.

[12] "Balkanization" means "the action of divid[ing] (an area) into smaller mutually hostile states;" from the adjective "Balkan" which describes "the peninsula bounded by the Adriatic, Aegean, and Black Seas, or the countries or peoples of this region." SHORTER OXFORD ENGLISH DICTIONARY 177 (6th ed. 2007).

[13] *See* Huening, *supra* note 6, *passim* (review of discourse in the Congolese press from 1996 through 2012). Lars-Christopher Huening explains the theory behind *non à la balkanisation!*:

> According to this theory, Western political-economic interests are seeking to divide up the DRC to facilitate the exploitation of its vast natural resources. This hypothesis views the Rwandan regime as the West's neocolonial proxy, subverting the DRC by perpetuating a state of war. In this context, the Congolese Kinyarwanda speakers [notably the Banyamulenge] are often implicitly suspected of being Rwanda's 'fifth column.'

Huening, *supra* note 6, at 17. "Kinyarwanda" is the language spoken in Rwanda.

"foreigners," take up arms against them, and call for their expulsion.[14] This is not due to xenophobia alone. Due to Congolese nationality law explicitly tying Congolese citizenship to Congolese ethnicity, the Banyamulenge's Congolese citizenship is susceptible to political manipulation.[15] In fact, it is the Banyamulenge's disenfranchisement under dictator Mobutu Sese Seko, in an effort to consolidate power by fomenting division, which encouraged their persecution in the late 1980's/early 1990's and led to war.[16] Nearly twenty years after the war's official conclusion, attacks against the Banyamulenge and calls for their expulsion, even their extermination, continue and have escalated since early 2019.[17]

The explicit tie of nationality to ethnicity is engraved in the Constitution of the DRC. People obtain Congolese citizenship either "by origin" (birth) or "by individual acquisition" (naturalization).[18] However, the Constitution defines the former, birthright nationality, neither as

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[14] *See, e.g.*, United Nations Joint Human Rights Office in the Democratic Republic of the Congo, UNHCR-MONUSCO, *Report on Hate Speech and Incitement to Hostility in the Democratic Republic of the Congo*, (Mar. 1, 2021), https://monusco.unmissions.org/sites/default/files/report_on_hate_speech_and_incitement_to_hostility_in_the_democratic_republic_of_the_congo_-_march_2021.pdf [hereinafter UNJHRO Mar. 2021]. *See also* Judith Verweijen & Justine Brabant, *Cows and Guns. Cattle-Related Conflict and Armed Violence in Fizi and Itombwe, Eastern DR Congo*, 55 J. MOD. AFR. STUDIES 1 (2017).

[15] *See generally* Jackson, *Of "Doubtful Nationality," supra* note 10; Georges Nzongola-Ntalaja, *The Politics of Citizenship in the Democratic Republic of Congo*, *in* MAKING NATIONS, CREATING STRANGERS: STATES AND CITIZENSHIP IN AFRICA 69, 75-76 (Sara Dorman et al. eds., 2007).

[16] Nzongola-Ntalaja, *Politics of Citizenship*, *id.*; *see also* RUHIMBIKA, *supra* note 5, at 23-58.

[17] *See* United Nations Joint Human Rights Office in the Democratic Republic of the Congo, OHCHR-MONUSCO, *Analytical Note on the Human Rights Situation in the Highlands of Mwenga, Fizi and Uvira Territories, South Kivu Province, Between February 2019 and June 2020*, ¶¶ 2, 3 & *passim* (August 1, 2020), https://monusco.unmissions.org/sites/default/files/ 20200806.unjhro.analyse_hauts_plateaux_en.pdf (documenting "growing tensions since January 2019 [which] ultimately led to a series of violent incidents," fueled by "hate speech by community leaders and politicians" and "the Congolese diaspora"); *Genocide Emergency: Democratic Republic of the Congo,* GENOCIDE WATCH (July 2020) https://www.genocidewatch. com/democratic-republic-of-congo (link to pdf embedded therein); U.N. Secretary-General, *Report on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, ¶¶ 13, 24, 41, 69, U.N. Doc. S/2020/554 (June 18, 2020) (documenting "an alarming resurgence in violence along ethnic lines" in South Kivu Province); S.C. Res. 2502, ¶¶ 5, 6, 29(i)(e) (Dec. 19, 2019) (noting "intensification of intercommunal violence fueled by hate speech" and acts "that may amount to genocide, war crimes and crimes against humanity," and consequently authorizing, *inter alia*, "targeted offensive operations…to neutralize armed groups…either unilaterally or jointly" with the Congolese Army).

[18] CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO Modifiée par la Loi no. 11/002 du 20 Janvier 2011 Portant Révision de Certains Articles de la Constitution de la République Démocratique du Congo du 18 Février 2006 (textes coordonnés) [CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO Modified by Law No. 11/002 of Jan. 20, 2011, Concerning Revision of Certain Articles of the Constitution of the Democratic Republic of the Congo of Feb., 18, 2006 (coordinated text)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO

being born on Congolese soil, nor as being born to a Congolese citizen parent – the typical manifestations of the *jus soli* and *jus sanguinis* forms of nationality, respectively.[19] Rather, those of Congolese nationality "by origin" are:

> every person belonging to ethnic groups of which the persons and the territory constituted that which became the Congo (presently the Democratic Republic of the Congo) at independence.[20]

The date of independence was June 30, 1960, from Belgium.[21] However, throughout Congolese legal history, this temporal line of demarcation periodically has been drawn earlier,[22] thereby excluding people whose ancestors arrived in Congo afterwards. Worse, the Banyamulenge's enemies maintain that they as an ethnic group simply did not possess any territory in the Congo as of June 30, 1960 – indeed, that they hold no title under customary law to any territory now.[23]

[52 J.O. NO. SPÉCIAL] [52 OFFICIAL GAZETTE OF THE DEMOCRATIC REPUBLIC OF THE CONGO, SPECIAL ISSUE], Feb. 5, 2011, art. 10, ¶ 2, cl. 1 (author's translation) [hereinafter DRC CONST., author's translation throughout].

[19] *See* T. ALEXANDER ALEINIKOFF ET AL., *Acquisition of Nationality by Birth, in* IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 49-98 (8th ed. 2016). "*Jus sanguinis*, the right of blood…. *Jus soli*, the law of the place of one's birth as contrasted to *jus sanguinis*, the law of the place of one's descent or parentage. It is of feudal origin." BLACK'S LAW DICTIONARY 1000 (4th ed. 1951).

[20] DRC CONST. art. 10, ¶ 2, cl. 2. The French language text of article 10, paragraph 2, reads:

> La nationalité congolaise est soit d'origine, soit d'acquisition individuelle. Est Congolais d'origine, toute personne appartenant aux groupes ethniques dont les personnes et le territoire constituaient ce qui est devenu le Congo (présentement la République Démocratique du Congo) à l'indépendance.

Id., art. 10, ¶ 2.

[21] *Congo, Democratic Republic of the*, THE WORLD FACTBOOK: CIA.GOV, https://www.cia.gov/ the-world-factbook/countries/congo-democratic-republic-of-the/ (last updated Mar. 15, 2021).

[22] The date initially was October 18, 1908,* under the first Congolese Constitution after independence; then, January 1, 1950,** under a special law passed in 1972 while the Banyamulenge were in favor with dictator Mobutu; then, all the way back to August 1, 1885,*** when in 1981 Mobutu's parliament rescinded that law, leaving in place another constitution he had imposed earlier. Stephen Jackson, *Sons of Which Soil? The Language and Politics of Autochthony in Eastern D.R. Congo,* 29 AFR. STUDIES REV. 95, 104-105 (2006). The significance of these dates is: *October 18, 1908 was the date of the Belgian Colonial Charter, officially annexing King Leopold's Congo Free State; over which he proclaimed himself King-Sovereign on ***August 1, 1885, having claimed the territory during the European Great Powers' carve-up of Africa at the 1884-85 Berlin Conference. The date **January 1, 1950, finds its significance in that the Belgian colonial administration had relocated large numbers of Tutsi from Rwanda-Burundi into the Congo during the 1920's-30's, having acquired the territory after World War I (it had been part of German East Africa). *See generally* MARTIN MEREDITH, THE FORTUNES OF AFRICA: A 5,000-YEAR HISTORY OF WEALTH, GREED AND ENDEAVOUR 390-395 & 443-456 (2014); Koko, *supra* note 9, at 50-54; GEORGES NZONGOLA-NTALAJA, THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY 18 (2002).

[23] *See* KELLY STAPLES, RETHEORIZING STATELESSNESS: A BACKGROUND THEORY OF MEMBERSHIP IN WORLD POLITICS 131-132 (2012). As Gillian Mathys explains:

> In practice, being considered a 'people' with a 'territory' is often dependent on or equated with having had a 'customary' organization [(a *chefferie* or chieftaincy)] recognized by the colonial

As long as Congolese law defines nationality in terms of ethnicity, it institutionalizes ethnic discrimination, and gives tribalism a permissive legal framework. As long as being Congolese is defined juridically as being a member of any given ethnic group, the more than 200 ethnic groups[24] residing within the Congolese nation-state – including the Banyamulenge – never will achieve a common Congolese national identity. More to the point, as long as ethnic discrimination is not merely permitted but also forms the very foundation of citizenship, then tribalism and xenophobia will be allowed to flourish unfettered. Peace has no chance in such a climate.

Therefore, if peace – a peace respectful of the DRC's territorial integrity, both internally and externally – ever is to be achieved in the Congo, the constitutionally-sanctioned framework of ethnic discrimination must be dismantled. Congolese citizenship must be decoupled from membership in an ethnic group, and the notion of nationality divorced entirely from that of ethnicity. This may seem impossible, and that the Banyamulenge's only conclusive remedy is to invoke the right of self-determination under both the International Covenant on Civil and Political Rights and the African Charter, including the African Charter's concomitant right to request intervention from abroad.[25] But that surely would lead to renewed war and further

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> administration….[t]he absence [of which] is simply equated with not having been there, and thus discredits claims to Congolese citizenship and the rights that go with it for these people.

Mathys, *supra* note 11, at 476-478. In other words, "ethnic citizenship determines entitlements to customary power, which, in turn, governs the explosive question of land." Jackson, *Sons of Which Soil?, supra* note 22, at 100. The result is that:

> Unfortunately, there [are] people in the Congo, and particularly in the east, who contest even the right of this group to call itself 'Banyamulenge,' and insist that there were no permanent settlements of Kinyarwanda-speaking people west of the Great Lakes.

Nzongola-Ntalaja, *Politics of Citizenship*, *supra* note 15, at 75.

[24] *See* WORLD FACTBOOK, *supra* note 21; *see also* NDAYWEL È NZIEM, *supra* note 5, at 256 fig.14 (map of Congo showing 365 different ethnic groups).

[25] *See* International Covenant on Civil and Political Rights, *infra* note 140, art. 1(1); African Charter on Human and Peoples' Rights, *infra* note 141, arts. 20(1) & 20(3).

suffering and mass bloodshed. To advocate for such a solution would be cynical, particularly by a Western outsider, and wicked.

Instead, this thesis proposes a peaceful solution through application and enforcement of international human rights law: that the DRC Constitution's definition of "nationality by origin" is incompatible with human rights law generally; and, specifically, that it violates the International Covenant on the Elimination of All Forms of Racial Discrimination[26] (to which the DRC is a party) and must be amended so as to remove any link between citizenship and membership in an ethnic group. After a brief description of the situation, this thesis will analyze the Congolese law of nationality under applicable international and regional human rights instruments, identifying potential causes of action and the fora in which they may be tried, and thereby recommend an overall strategy of litigation with the goal of changing the DRC Constitution and nationality law so as to define "nationality by origin" other than by reference to ethnic origin.

II. THE SITUATION

For a contemporary American,[27] the thought that a child, born on American soil to immigrant parents, could be "not American" or somehow "less American" than others, is bizarre. The thought that a child born to parents who *themselves* were born to immigrants and had lived in America all their own lives, could be "less American" than the child whose ancestors have been here for generations, is even more strange. And to think that such a child, even one born to great-grandchildren of immigrants *all* of whose descendants up to that child had lived in

[26] International Covenant on the Elimination of All Forms of Racial Discrimination, *infra* note 139, arts. 1(1) and 5(d)(iii).
[27] By "contemporary" this author means the late 20th century and thereafter.

America, could nevertheless be "foreign," is absurd. Yet that is exactly the case of the Banyamulenge people, a distinct minority ethnic group centered on the High Plains ("*les Hauts Plateaux*") of South Kivu Province in the east of the Democratic Republic of the Congo.[28]

The Banyamulenge are of the Tutsi ethnicity, the same ethnicity thrust onto the world's stage by the infamous Hutu-on-Tutsi Rwandan genocide of 1994. They migrated to the Congo from present-day Rwanda-Burundi at least five to six generations ago, although some say as early as the 17th century,[29] even before.[30] They were and are pastoralists, cattle herdsmen, originally nomadic, who came into Congo with their herds along the northern shore of Lake Tanganyika (see Map at Appendix I).[31] They settled in an area just north of present-day Uvira, and there named their settlement "Mulenge"[32] – whence the name "Banyamulenge:" "people

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[28] The narrative historical discussion which follows necessarily is abbreviated, at the risk of appearing simplistic, for there "is no longer any local agreement on the interpretation of historical events." Koen Vlassenroot, *Citizenship, Identity Formation & Conflict in South Kivu: The Case of the Banyamulenge*, 29 REV. AFR. POL. ECON. 499, 501 (2002). The sources referenced throughout, taken together, provide a more complete account of this enigmatic and heart wrenching story. Nevertheless – mindful of the late Professor Jean Elshtain's admonishment to "have available a comprehensive and accurate description for the situation on the ground" when discerning the justifications for violence – this author attempts to relate the facts essential to understanding this thesis, with the caveat that this narrative merely gleans from a hyper-complex, multi-faceted situation. Jean Bethke Elshtain, *Just War and an Ethics of Responsibility*, *in* ETHICS BEYOND WAR'S END 123, 126 (Eric Patterson ed., 2012) (A "notoriously tricky" task, "as competing sides…will characterize the situation in ways that best serve their own already stated conclusions concerning what is to be done.").

[29] *See generally* Alusala, *supra* note 7, at 92 (migration from Rwanda-Burundi into the Congo "over the past 400 years"); RUKUMBUZI DELPHIN NTANYOMA, BEHIND THE SCENES OF THE 'BANYAMULENGE MILITARY:' MOMENTUM, MYTH, AND EXTINCTION 6 & 23-32 (2019) (recounting oral traditions, and summarizing and critiquing the ethno-anthropological literature).

[30] Lazare Sebitereko Rukunda, Justice and Righteousness in Matthean Theology and its Relevance to the Banyamulenge Community: A Post-Colonial Reading, 94-96 (Nov. 2005) (Ph.D. dissertation, Univ. of Pretoria, Faculty of Theology), https://repository.up.ac.za/handle/ 2263/28278 (internal citations omitted) (as early as 1576).

[31] Unless otherwise indicated, the historical narrative in this and following paragraphs is based upon: Anthony Court, *The Banyamulenge of South Kivu: The 'Nationality Question,'* 72/3 AFRICAN STUDIES 416 (2013); JASON STEARNS ET AL., BANYAMULENGE: INSURGENCY AND EXCLUSION IN THE MOUNTAINS OF SOUTH KIVU (2013); PRUNIER, *supra* note 2; TURNER, *supra* note 1; Vlassenroot, *supra* note 28; MAHMOOD MAMDANI, *Tutsi Power in Rwanda and the Citizenship Crisis in Eastern Congo*, *in* WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 234-263 (2001). *See also* LIEVE JORIS, THE REBELS' HOUR 20-24 (trans. 2008) (2006) (a historical *roman à clef* based on the life story of a fictive Munyamulenge army officer); LOUISE MUSHIKIWABO, *Original Sin, in* RWANDA MEANS THE UNIVERSE, *supra* note 5, at 159-289 (a moving essay recounting Rwandan history relevant to an understanding of the forces which compelled certain peoples to migrate west from present-day Rwanda-Burundi).

[32] From "*uturenge*," according to Sebitereko Rukunda, meaning "small mountains between forests" in the Kinyarwanda language. *Supra* note 30, at 95.

from Mulenge" in the Kinyarwanda language, the singular being "Munyamulenge," as in "she is Munyamulenge."[33]

Gensis of the conflict

Being semi-nomadic pastoralists, however, in this new country they were not land owners but tenants of and tributary to the local chieftaincies ("*chefferies*" in French). When the colonizing Belgians arrived and cataloged the "indigenous peoples" in order to demarcate administrative districts and sectors, it was according to the landed chieftaincies' claims.[34] The Banyamulenge were therefore overlooked by the Belgian ethnic cartographers;[35] hence, they did not appear on the Belgian colonial maps, and consequently did not receive colonial administrative attention.[36]

With time the chieftaincies began to exact even greater tribute, motivating the Banyamulenge to migrate south and further up into the mountains, onto the High Plains of

[33] During the colonial period (1885-1960) and through the 1960's, there was more migration from Rwanda-Burundi into Congo, notably into the North Kivu Province, by peoples who share the Rwandan language (Kinyarwanda), and who are referred to as "Banyarwanda," meaning "people from Rwanda." Technically, therefore, one meaning of the term "Banyamulenge" is to connote a subset of "Banyarwanda." Although this thesis highlights the plight particular to the Banyamulenge, the same principles and consequences of ethnic discrimination in the attribution of nationality apply equally to all Banyarwanda, due to their not being "indigenous." Hence, much of the literature discusses the two interchangeably with regard to the nationality question, as does this author unless the specific context demands otherwise. *See* Koko, *supra* note 9, at 66. The total number of all Banyarwanda is estimated at 4,000,000. *Id.* at 49.

[34] *See* Vlassenroot, *supra* note 28, at 502-503; Court & STEARNS ET AL., *supra* note 31, at 422-424 & 14, respectively.

[35] *But see* Sebitereko Rukunda, *supra* note 30, at 122-126 (describing Banyamulenge chieftaincies initially recognized but then repressed by the colonial administration).

[36] From her 2004 trek to the High Plains of Itombwe in South Kivu, journalist and travel writer Lieve Joris recounts from her interviews with Banyamulenge elders:

> When their forebears came from Rwanda with their cows, they'd found mostly Bembe here, a rugged people who grew maize and beans, and hunted wild animals in the forest. The Banyamulenge were newcomers, so wherever they wanted to settle they had to pay the chief with cows. Apart from that, they were subject to the [customary] law. The Bembe had kept them hidden, fearing the Belgian government would officially recognize them.

Lieve Joris, *The High Plains*, 191 THE PARIS REVIEW 9, 29 (trans. 2009) (excerpted from LIEVE JORIS, DE HOOGVLAKTES (2008)).

Itombwe, settling in the area known as Minembwe (see Map at Appendix I).[37] When they arrived there, the area was relatively uninhabited. In Minembwe, they were isolated from greater Congolese society and more-or-less ignored by the *chefferies* and colonial authorities, although their annual transhumance[38] caused permanent animosity with the farmer-gatherer peoples throughout the region.[39] It is these *Hauts Plateaux* which the modern Banyamulenge identify as their rightful homeland, where their grand, great-grand, and great-great-grand parents' bones are buried.

The Banyamulenge are markedly physically different from their neighbors, and aloof, which came across to others as arrogance. "With their slender build, their archaic pride, and their majestic cows, they succeeded in overshadowing all the other peoples in the high plains – the Bembe, Fulero, Nyindu, and Shi."[40] In the 1950's there was a massive conversion of the Banyamulenge to Christianity, which gave rise to a class of Banyamulenge religious leaders and slowly brought the group out of its seclusion.[41]

When they began to ask for social services and political inclusion, they were met with the claim that they were not Congolese (or "Zairean" after dictator Mobutu renamed the country "Zaire" in 1971). The fact of their absence on the colonial maps "proved" that they only recently had arrived, and had no claim to citizenship, which was tied to having been administratively recognized by the former colonial government.[42] They were ostracized and became the

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[37] *See* Vlassenroot, *supra* note 28, at 502; Court, *supra* note 31, at 424; *see also* SEARCH FOR COMMON GROUND, ANALYSE DE CONFLIT [CONFLICT ANALYSIS]: ZONE "HAUTS PLATEAUX DE MWENGA-PLAINE DE RUZIZI" ["HIGH PLANES OF MWENGA-PLANE OF RUZIZI" ZONE] 20 (Oct. 2014), https://www.sfcg.org/wp-content/uploads/2015/12/SFCG-Analyse-ISSSS-Ruzizi-Mwenga-2014-1.pdf.

[38] "The seasonal transfer of grazing animals to different pastures, often over long distances; of French origin, from *transhumer* (ulteriorly from Latin TRANS + *humus*, ground)." SHORTER OXFORD ENGLISH DICTIONARY 3323 (6th ed. 2007).

[39] *See* Vlassenroot, *supra* note 28, at 502.

[40] Joris, *High Plains*, *supra* note 35, at 10.

[41] *See* STEARNS ET AL., *supra* note 31, at 17.

[42] *See* Vlassenroot, *supra* note 28, at 506-507; Court, *supra* note 31, at 428-429.

scapegoat for society's ills, as the widespread sentiment of Zairean patriotism which Mobutu had fostered during the 1970's evaporated with the increasing unsustainability of his kleptocratic reign.[43] Although Mobutu had come to the Banyamulenge's assistance in the mid-1960's by arming them so as to repulse so-called Marxist rebels who raided their herds under the name "*Simbas*" ("lions" in Swahili), he nevertheless passed a nationality law in 1981 which, effectively, relegated the Banyamulenge to the status of stateless persons.[44]

This act of state "contributed to sowing the seeds of racial hatred" toward the Banyamulenge.[45] In 1987, their candidates for legislative office were disqualified on the basis of "questionable nationality," and at 1991's all-Zaire "Conference of National Sovereignty" they were refused admission. When the Rwandan genocide broke in 1994, official Zairian government reporting branded the Banyamulenge as "foreign immigrants" on a par with the newly arriving hordes of refugees from Rwanda. In 1995, the Uvira District Commissioner ordered their expulsion from the territory, calling them "an unauthorized ethnicity." And the next year, in July 1996, the Governor of South Kivu Province, in which the *Hauts Plateaux* are located, called for "driving out the snakes" and an ethnic cleansing of the territory.[46]

The Congo Wars

It was this last diabolical clarion call which ostensibly prompted the new, post-genocide Rwandan government to invade Zaire in defense of their fellow Tutsis, i.e. the Banyamulenge.[47]

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[43] *See* DAVID VAN REYBROUCK, CONGO: THE EPIC HISTORY OF A PEOPLE 442 (trans. 2014) (2010).
[44] *See* RUHIMBIKA, *supra* note 5, at 15-36.
[45] *Id.* and the review of that book by René Lemarchand, *Review of Manassé (Müller) Ruhimbika, Les Banyamulenge (Congo-Zaïre) Entre Deux Guerres [The Banyamulenge (Congo-Zaire) Between Two Wars] (Paris: L'Harmattan, 2001),* 171 CAHIERS D'ÉTUDES AFRICAINES 683, 684 (2003). The remainder of this paragraph is based on these two sources.
[46] RUHIMBIKA, *supra* note 5, at 42.
[47] As Sadiki Koko of the University of Johannesburg explains:

> Although the question of the citizenship of the Banyarwanda was not the actual cause of the war – which had to do with Rwanda's determination to restore security on its border with the DRC and

The Rwandan army contained many Banyamulenge volunteers who had fled the persecution in Congo. Many had gone to Rwanda or Burundi to study, but with the increasing reports of a perilous and worsening situation back home, heeded the Rwandan army's call to prepare an armed return to their homeland to defend their people and exact justice.[48] As a prominent Congolese scholar explains:

> Congolese Tutsi youth had either joined the [Rwandan Patriotic Army (RPA)] as part of Tutsi solidarity or were forced by anti-Tutsi chauvinism in the Congo to prepare themselves to fight for their national rights as Congolese citizens.[49]

A contemporary Munyamulenge scholar is more direct: they were recruited into the RPA "in the name of the promise of a forthcoming liberation of Zaire…expecting to recover their lost citizenship in Zaire."[50]

The first Banyamulenge units, trained and equipped by the Rwandan Army, crossed into Zaire from Burundi on October 24, 1996; they took the town of Uvira the next day, Bukavu on October 30th, and Goma on November 1st, thus quickly controlling the Kivus.[51] However, Rwanda – along with its (then) allies Uganda and Burundi – had made pacts also with two other Zairian rebel movements; all three were merged into a single organization dubbed the Alliance of

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> the collapse of state institutions including the army in DRC – there is no doubt that it provided Rwanda with the ideal environment and 'ready-made' Congo-based allies needed in order to launch its military offensive in eastern DRC.

Sadiki Koko, *State-Building, Citizenship and the Banyarwanda Question in the Democratic Republic of Congo*, 35 STRATEGIC REVIEW FOR SOUTHERN AFRICA 41, 66 (2013) (internal citations omitted). Or, in other words, it:

> Provided Rwanda the excuse it needed to intervene in Congolese affairs with the pretext of trying to prevent another genocide. This is one of the justifications that Rwanda gave for its drive against the Hutu refugee camps in the Congo.

Nzongola-Ntalaja, *The Politics of Citizenship in the Democratic Republic of Congo*, *supra* note 15, at 75-76.

[48] *See* Filip Reyntjens & René Lemarchand, *Mass Murder in Eastern Congo, 1996-1997, in* FORGOTTEN GENOCIDES: OBLIVION, DENIAL, AND MEMORY 20, 22-23 (René Lemarchand ed., 2011).

[49] NZONGOLA-NTALAJA, CONGO FROM LEOPOLD TO KABILA, *supra* note 22, at 225. The RPA was the Tutsi rebel army, which stopped the genocide in July 1994, took power, and thereafter constituted the regular Rwandan army.

[50] RUKUMBUZI DELPHIN NTANYOMA, *supra* note 29, at 19.

[51] TURNER, *supra* note 1, at 76.

Democratic Forces for the Liberation of Congo-Zaire (AFDL),[52] with the aim of toppling Mobutu. Ironically for the Banyamulenge, the appointed head of the AFDL was the same man who had led the *Simbas* in the 1960's, who had raided the Banyamulenge's cattle and whom Mobutu had defeated with Banyamulenge support: one Laurent Désiré Kabila.[53] Joined by the main Rwandan Army, the AFDL forces, once assembled, marched on the capital "a thousand miles through the jungle,"[54] delayed only by the Rwandans' frequent pauses to "neutralize" Hutu refugee camps along the way.[55] The AFDL entered Kinshasa on May 17, 1997, and Kabila proclaimed himself President.

Unfortunately, Kabila set about governing the territory of Zaire, now restored to its original name of the Democratic Republic of the Congo, like "a warlord, not a statesman:"[56] that is, "with insolence, a lot of insolence."[57] His style of leadership, if it can be called that, was "secretive and incoherent."[58] Once he felt firmly ensconced in Mobutu's "marble palace" (as the presidential residence in Kinshasa was called), Kabila turned on his benefactors, and expelled all Rwandan forces, including his own Chief of Military Staff. This he did immediately upon his return from a trip to Havana, his first junket abroad as President.[59] The Banyamulenge, being

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[52] *Alliance des Forces Démocratiques pour la Libération*, in French.

[53] Nelson Alusala explains:

> When Rwanda sought for ways of neutralizing its enemies inhabiting refugee camps across in the DRC, they found Laurent-Désiré Kabila…who had for many years tried to topple Mobutu in vain. Museveni [the Ugandan president] is said to have settled on Kabila as the best choice for the task. The strategy was that Kabila would champion the citizenship course for the Banyamulenge [in exchange for their support of Kabila], so as to give the issue a "national" outlook. Once Kabila had been coopted in the plot, Kagame [the RPA leader] and Museveni proceeded to the next strategy: the establishment of the AFDL… The stage had been set for Rwanda's invasion of Zaire, and hence the extension of its civil war into Zaire.

Alusala, *supra* note 7, at 107-108.

[54] JASON K. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA 127-141 (2011).

[55] VAN REYBROUCK, *supra* note 43, at 451.

[56] LEMARCHAND, *supra* note 6, at 238.

[57] VAN REYBROUCK, *supra* note 43, at 468.

[58] PRUNIER, *supra* note 2, at 149-179.

[59] *Id.* at 178 (apparently with a fresh injection of "Marxist certainty" notes Prunier). During the 1960's, the *Simbas* had caught the eye of Fidel Castro, who dispatched a handful of Cuban troops under Che Guevara to conduct a brief

Congolese and not Rwandan, refused to leave – despite the Tutsi ethnicity they shared with the Rwandans.

Kabila quickly resorted to his predecessor Mobutu's method of divide-and-conquer, pitting ethnicities against each other – and particularly scapegoated the Banyamulenge for the present disorder. After all, most everyone had referred to the war toppling Mobutu as "the Banyamulenge Revolt," despite the official AFDL-imposed appellation "War of Liberation."[60] Kabila picked up the old polemic whereby the Banyamulenge's being Tutsi made them Rwandan, therefore foreigners to be expelled, and "officially inspired hatred and violence" against them.[61] Those who didn't leave faced persecution and death, worse than before the "revolution:"

> All over Congo, Tutsi [were] arrested, executed, lynched. In the streets of Kinshasa, those [who stayed were] roasted alive, burning car tires thrown around their necks to jeers from onlookers. In the military academy in the Katangese town of Kamina, Kabila [forces] shot all the Banyamulenge cadets.[62]

Within two weeks of being expelled, the Rwandan and Banyamulenge forces had regrouped in Rwanda, and invaded again in August 1998, again allied with Uganda and Burundi.

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incursion. *See* ERNESTO "CHE" GUEVARA, CONGO DIARY: EPISODES OF THE REVOLUTIONARY WAR IN THE CONGO (trans. 2012) (1965 diary published posthumously). Guevarra was prescient in his observations of Laurent Kabila:

> If I were asked whether I think there is any figure in the Congo who could become a national leader, I would not be able to answer in the affirmative… The only man who has genuine qualities of a mass leader is, in my view, Kabila…. but a man who has qualities of a leader cannot, simply for that reason, carry a revolution forward. It is essential to have a revolutionary seriousness, an ideology that can be a guide to action, a spirit of sacrifice that accompanies one's actions. To date, Kabila has shown that he possesses none of these qualities. He is young and might change, but I will be so bold as to state here…that I have very great doubts about his ability to overcome his defects in the environment in which he operates.

Id. at 238-239.

[60] STEARNS, DANCING IN THE GLORY OF MONSTERS, *supra* note 54, at 188.

[61] NZONGOLA-NTALAJA, CONGO FROM LEOPOLD TO KABILA, *supra* note 22, at 230 & 250 nn.42-44.

[62] JORIS, REBELS' HOUR, *supra* note 31, at 148. *See also* U.N. Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003* (Aug. 1, 2010), https://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjet Mapping.aspx [hereinafter Mapping Report].

This time the Banyamulenge organized themselves politically, under the name Rally for Congolese Democracy (RCD),[63] with the goal of toppling Kabila. Kabila, however, found allies in Angola, Chad, Zimbabwe and Namibia, who all deployed troops to assist the official Congolese Army, and prevented the Rwandan-RCD forces from repeating the march on Kinshasa of two years previous. However, Rwanda and the RCD succeeded in gaining control of nearly the whole eastern half of the Congo; and the RCD designated a large swath of terrain – extending from their concentration in Minembwe north to Uvira, west to Mwemba, and south to Fizi – the "Territory of Minembwe" [64] (see Map at Appendix I). The war soon ground to a stalemate, but the fighting continued for nearly five more years.[65]

To the majority of Congolese who had not felt the direct brunt of Laurent Kabila's rule, life in RCD-controlled territory did not feel like liberation but, rather, more like an occupation. "It was as if the RCD wanted to coerce the population into reconciliation" as one prominent analyst writes.[66] The RCD-Rwandan forces ruled with a heavy, zealous hand. Throughout the territory,[67] stories like this abounded:

> The rebels now controlled about half of Congo, but their popularity had dropped to less than nil. In the small eastern town of Kasika they'd recently been ambushed by Mai Mai fighters, community-based militiamen opposed to the Rwandese presence on Congolese soil. The rebels had lost several important officers and in revenge they'd murdered everyone for miles around. Kasika – the name hung in the air like a bad omen.[68]

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[63] *Rassemblement Congolais pour la Démocratie,* in French (the RCD is still an active political party in the DRC). This paragraph is based on TURNER, PRUNIER & Alusala, *supra* notes 1, 2 & 7, respectively.
[64] Kasper Hoffmann, *Ethnogovernmentality: The Making of Ethnic Territories and Subjects in Eastern DR Congo*, GEOFORUM: ELSEVIER (Oct. 2, 2019), https://doi.org/10.1016/j.geoforum. 2019.10.002, at 13.
[65] Laurent Kabila was assassinated in January 2001 by one of his child-soldier bodyguards, and succeeded by his son Joseph. The following month, Joseph Kabila met in Washington with Paul Kagame – the former RPF leader and new Rwandan President – to break ground on the eventual peace accords. *See* TURNER, *supra* note 1, at 199-208 (chronology of the wars and armed conflict from 1994-2006).
[66] STEARNS, DANCING IN THE GLORY OF MONSTERS, *supra* note 54, at 265.
[67] *See* Mapping Report, *supra* note 62.
[68] JORIS, REBELS' HOUR, *supra* note 31, at 152. *See also*, *e.g.*, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶¶ 858-1168 (July 8, 2019), https://www.icc-cpi.int/CourtRecords/ CR2019_03568.PDF , *aff'd* Case No. ICC-01/04-02/06 A A2, Judgment on Appeal (March 30, 2021), https://www.icc-cpi.int/CourtRecords/

The cruelty with which the RCD-Rwandan forces treated many of the rural communities throughout this vast territory spurred these hitherto non-politicized populations, each according to its own particular tribal or clan identity, to form self-defense militias – the "*Mai Mai"* referenced in the passage above. "*Mai*" means "water" in Swahili and most of the local languages; and these autonomous militias, numbering over 100, became generically known as "*Mai Mai*" due to the rituals they would undergo: to be sprinkled with *dawa* so that bullets might glance off of them like drops of water.[69]

Being local native sons who now rose up to defend their own, the respective local *Mai Mai* became the only forces trusted by the non-urban populations. But they were uneducated, illiterate, simple "village soldiers" with "no notion of a Congolese state," who "regarded even the inhabitants of a neighboring village as strangers;" their rituals and "traditions… dragg[ed] them back into old times, setting up little kingdoms built on hatred."[70] In terms of Pan-African liberation theory:

> They lack[ed] the kind of leadership and training necessary to acquire political discipline and a scientific understanding of reality; to liquidate… "remnants of tribal mentality;" and to abandon those "rites and practices which are incompatible with the rational and national character of the struggle."[71]

Unfortunately, as non-state armed groups organized initially for self-defense, the various *Mai Mai* have endured, and remain one of the chief sources of insecurity in Congo's eastern

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CR2021_03027.PDF (conviction of an RCD commander by the International Criminal Court for the war crimes and crimes against humanity of murder, intentionally attacking civilians, rape, sexual slavery, pillage, forcible transfer of population, conscription of child soldiers, attacking protected objects and destruction of an adversary's property, committed by him and the troops under his command).

[69] *See* GUEVARA, *supra* note 59, at 28 (*Dawa* "operates according to the following principle: A liquid in which herbal substances and other magical ingredients have been dissolved is thrown over the combatant. This protects him against all kinds of weapons…").

[70] JORIS, REBELS' HOUR, *supra* note 31, at 199.

[71] NZONGOLA-NTALAJA, CONGO FROM LEOPOLD TO KABILA, *supra* note 22, at 243 (quoting AMILCAR CABRAL, *National Liberation and Culture, in* UNITY AND STRUGGLE (1979)).

provinces today.[72] In and around the High Plains of Itombwe (see Map at Appendix I), they regularly mount attacks against Banyamulenge civilians and steal their cattle, provoking counter-attacks by Banyamulenge self-defense militias named Twigwaneho ("let's defend ourselves") and Ngumino ("let's stay here").[73]

Two concessions: Minembwe and the Nationality Law

As part of the peace accords, the RCD withdrew their claim over the land surface they had dubbed the "Territory of Minembwe," the name reverting to connote just the zone of their concentration up on the High Plains (see Map at Appendix I). As mentioned, the area of Minembwe is remote: it is a three-day walk to the town of Fizi, the nearest municipal center where basic civic services are rendered, such as birth, marriage and death certificates, voter registration, judicial services, etc.[74] In June 2013 a Ministerial Decree[75] was issued to incorporate the zone of Minembwe (as well as many other areas similarly situated throughout the DRC) as a "Rural Commune" – laying the legal foundation to organize delivery of state services to the inhabitants of the area; a Presidential Order approved the Decree and appointed a mayor.[76]

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[72] Here this author wishes to reiterate the caveat made *supra* note 28, and refer the reader who wishes a more comprehensive understanding of the eastern DRC armed groups phenomenon to both BERWOUTS, *supra* note 3, and JASON STEARNS, JUDITH VERWEIJEN & MARIA ERIKSSON BAAZ, THE NATIONAL ARMY AND ARMED GROUPS IN THE EASTERN CONGO: UNTANGLING THE GORDIAN KNOT OF INSECURITY (2013).

[73] Pierre Boisselet, *In the Highlands of South Kivu, a Political Impasse and a Chain of Desertions*, KIVU SECURITY TRACKER (Mar. 23, 2021), https://blog.kivusecurity.org/in-the-highlands-of-south-kivu-a-political-impasse-and-a-chain-of-desertions/. "Twigwaneho" and "ngumino" are in Kinyamulenge, the Banyamulenge language, a dialect of Kinyarwandan. *Id*.

[74] Based upon this author's interviews with Banyamulenge both in the US and in the DRC.

[75] Décret no. 13/029 du 13 Juin 2013 Conférant le Statut de Ville et de Commune à Certains Agglomérations du Sud-Kivu [Decree No. 13/029 of June 13, 2013, Conferring the Status of Town and Commune upon Certain Agglomerations in the Province of South Kivu], JOURNAL OFFICIEL DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO [54 J.O. NO. SPÉCIAL] [54 OFFICIAL GAZETTE OF DEM. REP. CONGO, SPECIAL ISSUE], June 20, 2013.

[76] Adolphe Muzito, Former DRC Prime Minister, Prepared Remarks for a Conférence sur la Problématique des Décrets sur la Commune de Minembwe [Conference on the Problem with the Decrees Concerning the Commune of Minembwe], Kinshasa, DRC (Oct. 13, 2020) (on file with author) (Muzito states that he had promulgated the Decree in 2012 but without Minembwe being included, and that the following year his successor rescinded and reissued the Decree to include Minembwe).

It was not until September 28, 2020, that the Decree and Order were implemented, at a ceremony in Minembwe attended by the Provincial Governor, the Chairman of the Armed Forces Chiefs of Staff, the Ministers of Defense and Decentralization, and Assemblymen from the National Assembly's Defense Committee.[77] This, however, set off a firestorm of criticism throughout the DRC, provoking virulent anti-Banyamulenge comments,[78] even from public officials,[79] re-energizing the accusations of the Banyamulenge being either secessionists or foreign invaders in the service of an irredentist Rwanda. Within 10 days, the DRC President suspended the Order.[80] Notably, the Minister of Decentralization had also been the political head of the RCD during the

[77] *See* Justin Mwamba, *RDC: Installation du Bourgmestre de Minembwe, Plus d'une Année Après sa Nomination [DRC: Installation of the Mayor of Minembwe, More Than a Year After his Nomination]*, ACTUALITE.CD (Sept. 28, 2020), https://actualite.cd/2020/09/28/rdc-installation-du-bourgmestre-de-minembwe-plus-dune-annee-apres-sa-nomination.

[78] Comments like this on social media were typical:

> These Rwandan Banyamulenge think we're idiots. Every Congolese person knows that they're in the Congo for the expansionist and conquering desires of Rwanda. There are snakes under the rocks. Everyone knows this. First, it was claiming nationality; then it's obtaining a municipality by fraud; and, finally, it probably will be secession. That's the plan. No way will we let our dear Congo be Balkanized by Rwandan Banyamulenge foreigners…

Reader comment posted Nov. 12, 2020, 10:03 PM, to Amira Malimi, *Gadi Mukiza: "Le Seul Problème de Minembwe est l'Insécurité" [Gadi Mukiza [putative mayor of Minembwe]: "The Only Problem About Minembwe is Insecurity"]*, MEDIACONGO.NET (Nov. 12, 2020), https://www.mediacongo.net/article-actualite-79001_gadi_mukiza__le_seul_probleme_de_minembwe_est_l_insecurite.html (author's translation).

[79] *See*, *e.g.*, Actu7/MCP wireservice, *"Minembwe n'ira Jamais au Rwanda. Ce sont Plutôt ceux qui Veulent le Vendre qui Risquent d'y Aller" (André Mbata) [Minembwe Will Never go to Rwanda. It's More Likely Those Who Wish to Sell it Will Go There" (Andre Mbata [Assemblyman])]*, MEDIACONGO.NET (Oct. 4, 2020), https://www.mediacongo.net/article-actualite-77008_minembwe_n_ira_jamais_au_rwanda_ce_sont_plutot_ceux_qui_veulent_le_vendre_qui_risquent_d_y_aller_andre_mbata.html. Popular opposition politician Martin Fayulu (who purportedly received the majority vote in the December 2018 Presidential election to succeed Joseph Kabila, of which Felix Tshisekedi, now President, was declared the winner), during a rally at which he called for further protests – a rally held four days *after* Tshisekedi suspended implementation of the Order (*see infra*) – stated:

> If today we let our guard down and leave Minembwe in the hands of these occupants, tomorrow we'll have no more country. We'll be the first to be colonized by another African people.

AFP (anonymous author), *L'Opposant Martin Fayulu Appelle les Congolais à Manifester pour "l'Intégrité Territorial" [Martin Fayulu Calls on Congolese to Rally for "Territorial Integrity"],* VOICE OF AMERICA (Oct. 13, 2020), https://www.voaafrique.com/a/ 5619788.html (author's translation).

[80] *See generally* Samir Tounsi, *DR Congo's Small Tutsi Community Targeted by Anti-Rwanda Hostility*, BARON'S: AFP NEWS (Oct. 14, 2020) https://www.barrons.com/news/dr-congo-s-small-tutsi-community-targeted-by-anti-rwanda-hostility-01602687608.

war – the National Assembly subpoenaed him on October 27th to appear and explain himself; calls for his resignation in the Assembly were cheered.[81]

Besides restoration of "Minembwe Territory," another outcome of the peace process, perhaps its most important, was a re-writing of the Congolese law on nationality so as to include the Banyamulenge – but not in absolute terms. During the negotiations, the RCD might have pushed for jettisoning the ethnicity criterion for nationality,[82] or otherwise "to define a more inclusive basis of rights, based on residence rather than ethnicity."[83] In the end, however, the RCD settled for the temporal line of demarcation being brought forward to the date of Congolese independence, June 30, 1960:

> Consensus is that the final text represented, on the one hand, about as much as the RCD rebels felt they could push for during the still-delicate Transition Period, but that, on the other hand, their opponents maintained enough ambiguity to make it possible for new difficulties to arise for Rwandophones.[84]

The language of the legislation adopted by the Transitional National Assembly in 2004,[85] later enshrined in the Constitution of 2006, contains two ambiguities: first "the persons" and then "the territory" which, taken together, "constituted that which became the Congo"[86] on June 30, 1960. Regarding the former, although it may appear "rather recursive,"[87] logic dictates that: because the Banyamulenge required a special law in 1972 to acquire nationality, which they did

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[81] Sonia Rolley, *Affaire de Minembwe en RDC: Azarias Ruberwa s'est à Nouveau Expliqué Devant les Députes [The Minembwe Affair in DRC: Azarias Ruberwa Explains Himself Again Before the MPs]*, RADIO FRANCE INTERNATIONAL (Oct. 28, 2020, 3:29 AM), https://www.rfi.fr/ fr/afrique/20201028-affaire-minembwe-rdc-azarias-ruberwa-expliqu%C3%A9 -devant-les-d%C3%A9put%C3%A9s.

[82] *See* Jackson, *Of "Doubtful Nationality," supra* note 10, at 489 (*citing* OULD LEBATT, *supra* note 4).

[83] *Cf.*, MAMDANI, *supra* note 31, at 249 (arguing that the Banyamulenge's preference for the appellation "Banyamulenge," connoting a place of origin, over "Banyarwanda," connoting [per Mamdani] an ethnicity of origin, is "an attempt to define a more inclusive basis of rights, based on residence rather than ethnicity.").

[84] Jackson, *Of "Doubtful Nationality," supra* note 10, at 491.

[85] Loi n° 04/024 du 12 Novembre 2004 Relative à la Nationalité Congolaise [Law No. 04/024 of Nov. 12, 2004, Relating to Congolese Nationality], JOURNAL OFFICIEL DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO [45 J.O. No. Spécial] [45 OFFICIAL GAZETTE OF DEM. REP. CONGO, Special Issue], Nov. 17, 2004.

[86] *See* DRC CONST. art. 10, cl. 4.

[87] Jackson, *Of "Doubtful Nationality," supra* note 10, at 492.

not possess under the Congo's first Constitution,[88] it follows that they were not a group which "constituted" the Congo at its founding.[89] The second is somewhat more direct: because they were mere tenants upon land owned by indigenous groups, hence not owning the territory upon which they lived,[90] the Banyamulenge ethnic group is not one "of which the… territory constituted that which became the Congo…at independence."[91] "While these arguments may sound casuistic," as Jackson surmised in 2007, "they strongly resemble those successfully used in the past to justify denial of nationality."[92] Indeed, echoes of them reemerged so strongly in September-October 2020 after the Minembwe Rural Commune installation[93] that President Tshisekedi felt compelled to back-track, and quickly. The polemic continues unabated.[94]

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[88] *See supra* note 22 (dates of reference for determination of nationality throughout Congolese legal history).
[89] Jackson, *Of "Doubtful Nationality," supra* note 10, at 492.
[90] *Accord*, JEAN-CLAUDE WILLAME, BANYARWANDA ET BANYAMULENGE: VIOLENCES ETHNIQUES ET GESTION DE L'IDENTITAIRE AU KIVU [ETHNIC VIOLENCE AND IDENTITY MANIPULATION IN KIVU] 126 (1997) (describing a "fundamental cultural misunderstanding" between those of Rwandan descent and the surrounding indigenous groups concerning the acquisition of land. For the latter, "when a chief 'gives' a piece of land in exchange for payment, he never sells it; he merely lends it out temporarily.") (author's translation).
[91] DRC CONST. art. 10, cl. 4.
[92] Jackson, *Of "Doubtful Nationality," supra* note 10, at 492.
[93] Statements like this were typical across social media:

> The Banyamulenge, those who had been integrated during the colonial period, are NATURAL-IZED Congolese, but they have no ancestral lands in Congo!!!...Ruberwa and the Kabila stooge want to fraudulently give them an ancestral home in DRC. UNACCEPTABLE.

Actu7/MCP wireservice, *"Minembwe n'ira Jamais au Rwanda,"* *supra* note 79, reader comment posted Oct. 4, 2020, 10:46 PM (author's translation) ("the Kabila stooge" apparently is a reference to President Tshisekedi; "Ruberwa" is the Minister of Decentralization). Also:

> LEAVE THE COUNTRY AND LEAVE BEHIND THE LAND OF OUR ANCESTORS. YOU ARE REALLY FOREIGNERS.

Id., reader comment posted Oct 5, 2020, 11:30 AM (author's translation).
[94] Comments like this appeared in reaction to reporting on a March 29-31, 2021, Inter-Community Dialogue for Peace and Security on the High and Middle Planes of Fizi, Uvira and Mwenga:

> The Banyamulenge are Rwandans, period. We must revisit the question of nationality in our constitution. Real Congolese tribes are those which existed on our territory since 1885…. I personally condemn those legislators who accepted the choice of 1960 as the year of reference for belonging to the Congolese nation. This has permitted Rwandan terrorists to claim Congolese nationality by origin. It is high treason.

Reader comment posted Apr. 2, 2021, 8:46 AM, to Djodjo Vondi, *"L'Identité Banyamulenge est non Négociable," Insiste Moise Nyarugabo ["The Banyamulenge Identity is Non-Negotiable Insists Moise Nyarugabo"],* MEDIACONGO.NET (Apr. 1, 2021), https://www.mediacongo. net/article-actualite-85312_1_identite_banyamulenge_est_non _negociable_insiste_moise_nyarugabo.html, (author's translation). *See* International Organization for Peacebuilding, *DR Congo: Social Cohesion in Focus at South Kivu Inter-Community Peace Dialogue*, INTERPEACE (Apr. 8, 2021), https://www.interpeace.org/2021/04/cohesion-community-dialogue/ (official conference report)

Customary authority

This attachment to ethnocentric nationality finds its root in the former colonial model of governance. "In the precolonial era, there were significant flows of people between territories…. 'Strangers…moved with relative ease between indigenous African polities.'"[95] In order to govern this vast and diverse area from afar, the European colonial authorities employed a system of indirect rule. In the Congo, the Belgian colonial authority demarcated the entire territory into separate "ethnic territories, known as *chefferies* (chiefdoms)," which were "mutually exclusive, ethnically discrete territories [each] ruled by a single customary chief [(*chef coutumier*)] governing through customary law."[96] This system of *chefferies* was "reinforced [through] direct, disciplinary, and coercive techniques of power"[97] by the colonial master. "Through the making of chiefdoms, the colonial authorities aimed to govern indigenous people at a distance, not as individuals, but as 'tribes,' or 'races.'"[98] In other words:

> The colonizers' approach to local administration, in particular their reliance upon customary chiefs representing territorially fixed ethnic communities as intermediaries, …fostered the territorialization of ethnicity and the ethnicization of local authority.[99]

A prominent Congolese scholar is more blunt: the colonial authority "sought to impose its hegemony through paternalism, white supremacy and administratively imposed ethnic divisions among Africans."[100] This had a profound effect upon the Congolese psyche, as the colonial

("The big challenge… is… a persistent inter-community conflict over land, power, identity and citizenship [which] has torn societies apart.").

[95] Jeffrey Herbst, *The Role of Citizenship Laws in Multiethnic Societies: Evidence from Africa*, *in* STATE, CONFLICT, AND DEMOCRACY IN AFRICA 267, 268 (Richard Joseph ed., 1999) (quoting WILLIAM A. SHACK, STRANGERS IN AFRICAN SOCIETIES 8 (1979)).

[96] Hoffmann, *supra* note 64, at 3.

[97] *Id*. at 4.

[98] *Id*. at 3.

[99] Verweijen & Brabant, *supra* note 14, at 10.

[100] Nzongola-Ntalaja, *Politics of Citizenship*, *supra* note 15, at 73.

authorities' "expression of all things in terms of tribe" "created" an inward-looking "tribal consciousness."[101]

On June 30, 1960, the independent Congolese state came forth from this womb of colonial indirect rule, retaining a model of governance whereby the central State guarantees civil and political rights, and membership in a State-sanctioned customary authority guarantees economic and social rights.[102] The former are individual rights, the latter group rights.[103] Outside of the urban centers, "the key socioeconomic right is the right to use land as a source of livelihood."[104] The Constitution of 2006 does declare that "private property is sacred," and directs "the State" to "guarantee the right to individual or collective property acquired in conformance with law or custom."[105] However, "non-indigenous citizens," such as the Banyamulenge, "are denied 'customary' access to land since they do not have their own [Customary] Authority,"[106] headed by a *chef coutumier*. "To access land in 'customary' areas, they are compelled to pay tribute to 'customary' authorities in these areas."[107]

Customary authority throughout the Congo is organized at four levels: first the locality or *zone*; then the *groupement* (a grouping of settlements or villages); then the *collectivité* (a

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[101] NDAYWEL È NZIEM, *supra* note 5, at 471 (author's translation). This accentuation of division by insisting on a "tribal" classification of each human being is what Pan-African and African Independence activist Aimé Césaire lamented as the equation of "colonization" with "'thingification.'" AIMÉ CÉSAIRE, DISCOURSE ON COLONIALISM 35 (reprint 2000) (trans. 1972) (1955).

[102] Unless where otherwise indicated, this paragraph is based upon MAMDANI, *supra* note 31.

[103] Mamdani explains:

> Civic citizenship is a consequence of membership of the central state. Both the qualifications for citizenship and the rights that are its entitlement are specified in the constitution. Under deracialized civil law, these rights are mainly individual and are located in the political and civic domain. In contrast, ethnic citizenship is a result of membership in the Native Authority. It is the source of a different category of rights, mainly social and economic.

Id. at 238.

[104] *Id*.

[105] DRC CONST. art. 34, cl. 1 & 2 (author's translation) ("La propriété privée est sacrée. L'Etat garantie le droit à la propriété individuelle ou collective acquis conformément à la loi ou à la coutume.").

[106] MAMDANI, *supra* note 31, at 238 (using the term "Native Authority" for customary authority).

[107] *Id*.

collective of groupings); finally, the *territoire*.[108] The chiefs at each level answer to those immediately higher. "Only those [peoples] considered indigenous, however, have the right to a chief…from one of their own" at any level above the locality.[109] "The distinction is crucial," as Mahmood Mamdani explains, "for customary power really rests at the level of the *chef de groupement*" and higher:

> They have the power to confirm ethnic belonging and to issue identity cards, oversee administration, allocate customary land for livelihood, hold tribunals through which customary justice is meted out, run local markets, and so on.[110]

Tyrannical consequences

The Banyamulenge, however, "have never had their own [Customary] Authority;" their chiefs have been "confined to the first level," and they have "paid homage to existing chiefs where they settled" for access to these services.[111] Hence the fundamental importance to the Banyamulenge of incorporating the *zone* of Minembwe.[112] Hence, also, the fierce opposition it engenders among the surrounding *groupements*, *collectivités* and beyond – as the RCD and Rwandan Army had, during the war, seized the surrounding three *territoires* and hegemonically renamed them the *Territoire de Minembwe*.[113]

Nevertheless, the Banyamulenge's military action in self-defense certainly was understandable, for "to exclude from citizenship people with whom the territory is shared,"[114] as

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[108] *See* Map of South Kivu Province, at Appendix I; MAMDANI, *supra* note 31, at 238 & 248.
[109] MAMDANI, *supra* note 31, at 238.
[110] *Id*.
[111] *Id*. at 248.
[112] The denial to them of ready access to state civil services also may render them *de facto* stateless. *See infra* note 207 and accompanying text.
[113] Uvira, Mwenga and Fizi. Hoffmann, *supra* note 64; *see* Map of South Kivu Province, *infra* Appendix I.
[114] JEFFREY HERBST, *The Politics of Migration and Citizenship*, *in* STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL 235 (2000).

Michael Walzer puts it, "is a form of tyranny. Indeed, the rule of citizens over non-citizens, of members over strangers, is probably the most common form of tyranny in human history."[115] The exclusion from customary authority of "whole groups who are physically located in a state but who cannot claim descent from ancestors" is, as Jeffrey Herbst explains, "the inevitable cost of allocating citizenship based on criteria more complicated than location of birth."[116]

It indeed leads to tyranny – and much more. State building on the basis of shared ancestry, as Kwame Anthony Appiah observes, eventually will confront the "difficulty" of "living side by side" with "people of other ancestries." To this problem, however, "[t]he logic of shared ancestry offers only three possible" solutions: assimilation, expulsion, or annihilation. "None of them would be necessary if we were not trying to match" citizenship with ethnicity.[117]

What follows is a strategy of litigation to change the Constitution and laws of the DRC, through the application of international human rights law, so as not to define "nationality by origin" through reference to ethnic origin.[118] The strategy first identifies and discusses how the DRC Constitution and corresponding nationality law violate three treaties: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.[119] The strategy then identifies and discusses each forum available in which to litigate these "causes of action," and in what sequence.

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[115] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 62 (1983).
[116] HERBST, *supra* note 114.
[117] KWAME ANTHONY APPIAH, THE LIES THAT BIND: RETHINKING IDENTITY 80 (2019) ("…to match states to nations" in Appiah's words).
[118] Also recommending adoption of language proposed by the African Commission on Human and Peoples' Rights. *See infra*, notes 300-304, 357-361, and accompanying text.
[119] *Infra* notes 139, 140 & 141, respectively.

III. LITIGATION STRATEGY

A. Causes of Action Under International Human Rights Law

To understand how any provision of international human rights law may affect the Congolese Constitution, a preliminary examination of certain aspects of the Constitution is necessary.

1. Constitution of the DRC

The Constitution of the Democratic Republic of the Congo (2006) embraces human rights as a matter of positive law. Title II of the Constitution, consisting of 56 articles, is devoted to "Human Rights, Fundamental Liberties and Duties of the Citizen and of the State."[120] Among these is the right not to be discriminated against on the basis of race or ethnicity.[121] However, the DRC Constitution expressly guarantees this right only to Congolese citizens, not to every person on the territory, since it categorizes the right as civil and political.[122] Moreover, none of the rights, freedoms or duties enumerated under Title II explicitly address access to citizenship.

Article 51 of the Constitution does task the Congolese State with ensuring "the protection and promotion of vulnerable groups and of all minorities" and "to look after their fulfilment."[123] Whether this applies regardless of citizenship status is unclear. The provision would be less ambiguous if not for the article's first sentence, which reads: "The State has the duty to ensure

[120] Title II (articles 11-67) of the DRC Constitution is headed "Des Droits Humains, des Libertés Fondamentales et des Devoirs du Citoyen et de l'Etat [On Human Rights, Fundamental Liberties, and Duties of the Citizen and State]." 52 OFFICIAL GAZETTE OF THE DEMOCRATIC REPUBLIC OF THE CONGO, SPECIAL ISSUE, *supra* note 18, at 11.
[121] DRC CONST. art. 13. The Constitution even charges each Congolese citizen with "the duty to respect and to treat his co-citizens without any discrimination whatsoever and to maintain with them relations which allow the preservation, promotion and reinforcement of national unity, and reciprocal respect and tolerance." *Id.*, art. 66, cl. 1 ("Tout Congolais a le devoir de respecter et de traiter ses concitoyens sans discrimination aucune et d'entretenir avec eux des relations qui permettent de sauvegarder, de promouvoir et de renforcer l'unité nationale, le respect et la tolérance réciproques.").
[122] DRC CONST. art. 11.
[123] DRC CONST. art. 51, cl. 2 & 3 ("L'Etat…assure…la protection et la promotion des groupes vulnérables et de toutes les minorités. Il veille à leur épanouissement.").

and promote the peaceful and harmonious coexistence of all ethnic groups of the country."[124] The phrase "groups of the country" as it appears in the original French language of the text, "*groupes ethniques du pays*," can be read as either "ethnic groups *of* the country," or "ethnic groups *from* the country." The former could be taken broadly to mean all ethnic groups found throughout the territory; the latter implies a narrower set of ethnic groups, even one limited to indigenous ethnic groups.

However, the DRC Constitution also expressly incorporates into Congolese law the provisions of "duly ratified treaties,"[125] and assigns to them "an authority superior to that of [domestic] laws."[126] Moreover, treaty provisions attain domestic force of law "as of their publication," and Congolese courts may apply them directly, without need of implementing legislation.[127] This is contrary to most common law jurisdictions, which take a "dualist" approach to international and domestic law, viewing them as separate legal systems, and requiring explicit domestication of treaty provisions through implementing legislation before domestic courts may apply them.[128] Yet the Congolese legal system is heavily derived from that

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[124] *Id.*, art. 51, cl. 1 ("L'Etat a le devoir d'assurer et de promouvoir la coexistence pacifique et harmonieuse de tous les groupes ethniques du pays.").

[125] DRC CONST. art. 153, cl. 4. This provision defines the corpus of Congolese law which the judiciary shall apply:

> The Courts and Tribunals, civil and military, apply duly ratified international treaties, laws, [and] regulations as far as they conform with the laws as well as custom as far as it is not contrary to public order or good morals. [Les Cours et Tribunaux, civils et militaires, appliquent les traités internationaux dûment ratifiés, les lois, les actes réglementaires pour autant qu'ils soient conformes aux lois ainsi que la coutume pour autant que celle-ci ne soit pas contraire à l'ordre public ou aux bonnes mœurs.]

Id. (author's translation).

[126] DRC CONST. art. 215.

[127] *Id.* The full text of article 215 reads:

> Treaties and international agreements regularly concluded have, as of their publication, an authority superior to that of laws, subject to for each treaty or agreement, its application by the other party. [Les traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de son application par l'autre partie.]

Id. (author's translation).

[128] *See generally* David L. Sloss, *Domestic Application of Treaties, in* THE OXFORD GUIDE TO TREATIES 358 (Duncan B. Hollis ed., 2d ed. 2020).

of Belgium, a civil law jurisdiction. Hence, the DRC Constitution, by directing Congolese judges to apply treaties and international agreements,[129] reflects a "monist" theory of law, where international and domestic law are integrated into one system, and in which international law has pride of place.[130] Some criticize this theory as being unrealistic and inconsistent in practice, particularly on the African continent.[131] This is due to the inevitable conflict between parochial national interests and international obligations within a world order where national sovereignty is sacrosanct.[132] But the DRC has had success in following the monist approach, as seen through its courts' having directly applied the substantive provisions of the Statute of the International Criminal Court many years before the DRC National Assembly enacted legislation domesticating the Rome Statute.[133]

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[129] DRC CONST. art. 153, cl. 4.

[130] As described by the venerable Antonio Cassese (1937-2011):

> This theory is based on a number of postulates. First, there exists a unitary legal system, embracing all the various legal orders operating at various levels. Second, international law is at the top of the pyramid and validates or invalidates all the legal acts of any other legal system. Consequently, municipal law must always conform to international law. In cases of conflict, the latter declares all domestic rules or acts contrary to it to be illegal. A further corollary is that the 'transformation' of international norms into domestic law 'is not necessary from the point of view of international law.' This is because international and national law are 'parts of one normative system.'… In addition, the sources of international law belong to a legal system that is hierarchically superior to municipal systems, not radically different from them. As a result, international rules can be applied *as such* by domestic courts, without any need for transformation.

ANTONIO CASSESE, INTERNATIONAL LAW 215 (2d ed. 2005) (internal citations omitted, emphasis in original). By "transformation" Cassese means "domestication."

[131] *See generally* FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 518 (2d ed. 2012).

[132] *See* CASSESE, *supra* note 130, at 213-237. For a strenuous rejection from the common law perspective of monist theory's subordination of national to international law, *see* Roger P. Alford, *The United States Constitution and International Law: Misusing International Sources to Interpret the Constitution*, 98 A.J.I.L. 57 (2004). Such criticism echoes the original eighteenth century articulation of monist theory which "asserted the existence of a single set of legal systems, [i.e.] the domestic legal orders," and wherein treaty law "was only a set of guidelines whose provisional value was removed as soon as a powerful State thought they were contrary to its interests." CASSESE, *supra* note 130, at 214. In this vein, some today employ the label "monist" to categorize the United States, albeit a monism bending toward nationalism instead of internationalism. *See* Sloss, *supra* note 128, at 361. This author, however, employs the term "monist" solely in the internationalist sense.

[133] *See* JACQUES B. MBOKANI, CONGOLESE JURISPRUDENCE UNDER INTERNATIONAL LAW: AN ANALYSIS OF CONGOLESE MILITARY COURT DECISIONS APPLYING THE ROME STATUTE (trans. 2017) (2016).

True to the monist approach, article 216 of the DRC Constitution provides that, should a treaty provision be found by the DRC Constitutional Court to be contrary to the Constitution, such treaty may be ratified only if the Constitution is brought into conformity with it:

> If the Constitutional Court…declares that a treaty or international agreement contains a clause contrary to the Constitution, the ratification or accession may only occur after revision to the Constitution.[134]

This reflects the prime monist principle, articulated in article 215: that treaty law has "an authority superior to that of" domestic law and that even the national constitution must bend to it. Article 216, however, speaks in a context of *pre*-ratification/accession. Yet a fact of nonconformity remains the same regardless of which came first, the treaty or the national constitution. The monist principle militates for correction of the domestic law whenever nonconformity with the international is revealed.[135] Therefore, the corollary argument states that if the Court finds a provision of the Constitution to be contrary to an already-ratified treaty, such provision must be brought into conformity with the treaty.[136] This should be particularly true if the treaty has evolved into a *jus cogens* norm, on a par with the prohibitions of apartheid, slavery and genocide.[137]

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[134] DRC CONST. art. 216 ("Si la Cour constitutionnelle consultée par le Président de la République, par le Premier ministre, le Président de l'Assemblée nationale ou le Président du Senat, par un dixième de députés ou un dixième des sénateurs, déclare qu'un traité ou accord international comporte une clause contraire à la Constitution, la ratification ou l'appropriation ne peut intervenir qu'après la révision de la Constitution."). It, as well as article 215 (text *supra* note 127), are modeled upon the French Constitution of 1958. *See* VILJOEN, *supra* note 131, at 518 n.6.
[135] CASSESE, *supra* note 130, at 216 ("It follows that international values override national ones and that State officials must always strive to achieve the objectives set by international rules.").
[136] *Accord*, Hum. Rts. Comm., Gen. Comment No. 31 (on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), U.N. Doc. CCPR/C/21/Rev.1/Add. 13, at 5, ¶ 13 (May 26, 2004); *see infra* text accompanying note 245.
[137] *See infra* notes 151-153 and accompanying text.

2. Treaties violated by the DRC Constitution

Article 10 of the DRC Constitution, the second clause of the second paragraph which defines Congolese nationality "by origin" in terms of ethnicity,[138] directly conflicts with at least three treaties to which the DRC has acceded or has ratified: The International Convention on the Elimination of All Forms of Racial Discrimination (1966),[139] the International Covenant on Civil and Political Rights (1966),[140] and the African Charter on Human and Peoples' Rights (1981).[141] Each is discussed in turn.

a. The International Convention on the Elimination of All Forms of Racial Discrimination (1966)

The DRC, during the time it was known as Zaire, acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD or Convention) on April 21, 1976.[142] It did so without lodging any reservation, understanding or declaration, and has not made any since.[143] The Convention, in its article 1(1), prohibits "racial discrimination," which it defines as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin…"[144] The Convention further mandates, at article 2(1)(c), that States Parties "shall take effective measures to…amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination…"[145]

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[138] *See* text accompanying note 18 *supra* and text accompanying note 161 *infra*.
[139] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].
[140] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
[141] African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter Afr. Charter].
[142] *See International Convention on the Elimination of All Forms of Racial Discrimination, Table of Participants, Dates of Signatures & Ratifications, Declarations & Reservations, and Objections*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en#EndDec (last visited Apr. 14, 2021) [hereinafter ICERD Table].
[143] *Id.*
[144] ICERD art. 1(1).
[145] ICERD art. 2(1)(c).

Furthermore, since the Convention's coming into force in 1969,[146] its prohibition of racial discrimination has attained the status of *jus cogens*: [147] that is, it has entered that category of peremptory general rules of international law including "apartheid, slavery and genocide," which are "accepted by the international community as standards from which no derogation is permitted."[148] Moreover, it also has attained the concomitant status of an obligation *erga omnes*: counted among those "obligations of a State towards the international community as a whole" which, "by their very nature… are the concern of all States," and for which "all States can be held to have a legal interest in their protection."[149] The International Court of Justice recently clarified that any State, "and not only a specially affected State," may hold another State to account "with a view toward ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end."[150]

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[146] On January 4, 1969 in accordance with ICERD article 19. *See* ICERD Table, *supra* note 142.

[147] NATAN LERNER, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION xxv (rev. ed. 2015) (1980) (citing Jose D. Ingles, *Study on the Implementation of Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination: Positive Measures Designed to Eradicate All Incitement to, or Acts of Racial Discrimination*, U.N. Doc. A/CONF 119/10.CERD 2, at 38 (1986)). *Cf.,* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 100, 101 & 173.4 (Sept. 17, 2003) (unanimous opinion):

> The principle of … non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle in acceptable, and discriminatory treatment of any person, owning to…ethnic...origin… is unacceptable. This principle…forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.

Id. ¶ 101.

[148] CASSESE, *supra* note 130, at 65. *See, cf.,* Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."). The Vienna Convention entered into force on January 27, 1980 and, although not universally ratified, most non-ratifying States, including the United States, recognize the Convention as reflecting binding customary international law. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 306 (AM. L. INST. 2018).

[149] Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, [Barcelona Traction] 1970 I.C.J. 3, 32, ¶¶ 33-34 (Feb. 5). *See generally* CASSESE, *supra* note 130, at 16, 64-68, 195 & 262 (discussing obligations "*erga omnes contractantes* laid down in a multilateral treaty safeguarding fundamental values.").

[150] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order, 2020 I.C.J. 1, 13, ¶ 41 (Jan. 23). In so

In fact, the DRC itself has recognized the *jus cogens* status of the Convention's prohibition, albeit indirectly: in a case it brought against Rwanda in 2002, its representative argued before the International Court of Justice in 2005[151] that the *jus cogens* prohibitions of genocide and racial discrimination preempt any State Party reservation to the Court's jurisdiction under either the Genocide Convention[152] or the ICERD.[153] In its brief, the DRC also recognized the *erga omnes* obligation of all States to protect against violations of "the basic rights of the human person, including…racial discrimination."[154]

In addition to prohibiting racial discrimination generally, the ICERD enumerates many specific contexts in which the prohibition operates. One of these is the enjoyment of the human right to nationality.[155] Article 5(d)(iii) of the ICERD provides that:

> State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to…ethnic origin, to equality before the law, notably in the enjoyment of…in particular…the right to nationality.[156]

The DRC Constitution provides that Congolese nationality is acquired in one of two ways: either "by origin," or "individually acquired."[157] Defining the parameters of individual acquisition is deferred to the legislature.[158] The Constitution itself does, however, define

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holding, the Court overruled Myanmar's objection that The Gambia lacked standing to bring a claim against Myanmar under the Genocide Convention, due to The Gambia – on a different continent – not being a State "injured" by Myanmar's alleged misconduct (unlike, e.g., Bangladesh due to flows of Rohingya refugees from adjacent Myanmar). *Id.* at 12, ¶ 39.

[151] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) [DRC v. Rwanda], Hearing on Jurisdiction and Admissibility, Verbatim Record, ¶¶ 12.7-12.9 (July 8, 2005, 10:00 a.m.), https://www.icj-cij.org/public/files/ case-related/126/126-20050708-ORA-01-00-BI.pdf (orig.), https://www.icj-cij.org/public/files/ case-related/126/126-20050708-ORA-01-01-BI.pdf (trans.).

[152] Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948, 78 U.N.T.S. 277.

[153] ICERD art. 22.

[154] DRC v. Rwanda, Requête Introductive d'Instance [Application Instituting Proceedings], at 29 (May 28, 2002), https://www.icj-cij.org/public/files/case-related/126/7070.pdf (quoting Barcelona Traction, 1970 I.C.J. at 32, ¶ 34).

[155] *See* Universal Declaration of Human Rights, art. 15, G.A. Res. 217 (III) A (Dec. 10, 1948) [hereinafter UDHR].

[156] ICERD art. 5(d)(iii).

[157] DRC CONST. art. 10, ¶ 2, cl. 1.

[158] DRC CONST. art. 10, ¶ 2, cl. 3.

acquisition of nationality "by origin" – but not as being born either on Congolese territory, or of a Congolese parent, or a combination of the two, as is the norm throughout most of the world.[159] Rather, it defines the concept by declaring "to be Congolese[160] of origin:"

> all person[s] belonging to ethnic groups of which the persons and the territory constituted that which became the Congo (currently the Democratic Republic of the Congo) at independence.[161]

This provision of the DRC Constitution, replicated in its implementing legislation,[162] starkly contrasts with ICERD article 5(d)(iii), quoted above, by purposely distinguishing those eligible for citizenship by origin, from those not eligible for citizenship by origin, on the basis of *ethnic* origin. Moreover, the provision clearly contradicts ICERD article 1(1), in that it creates a "preference based on … ethnic origin"[163] regarding access to Congolese citizenship. Article 10 of the DRC Constitution, therefore, violates the ICERD both generally at article 1(1), and also specifically at article 5(d)(iii).[164] Hence, the DRC must "amend, rescind or nullify" this

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[159] *See* Douglas Klusmeyer, *Introduction*, *in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 5 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000).

[160] "Est congolais…," literally, "Is Congolese…"

[161] DRC CONST. art. 10, ¶ 2, cl. 2 (original French text appears at note 20, *supra*).

[162] Article 6 of Law No. 04/024 of Nov. 12, 2004 Relating to Congolese Nationality [Loi n° 04/024 du 12 Novembre 2004 Relative à la Nationalité Congolaise], 45 OFFICIAL GAZETTE OF DEM. REP. CONGO, special issue [45 JOURNAL OFFICIEL DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO [J.O.], n° spécial], Nov. 17, 2004. Although pre-dating the 2006 Constitution, when enacted the law was in implementation of a similar provision in the Transitional Constitution of April 1, 2003, which had been adopted as part of the peace accords ending the Second Congo War, establishing a government of transition with a view toward a constitutional plebiscite in 2006. The law on nationality grew out of those accords and the Inter-Congolese Dialogue held shortly thereafter. *See* Introductory Remarks [Exposé des Motifs] to Law 04/024 of Nov. 12, 2004, 45 J.O. n° spécial, at i.-v.

As mentioned *supra* notes 82-84 and accompanying text, the legislation adopted was a compromise, not an absolute solution of the Banyamulenge's Congolese nationality. *See* Jackson, *Of "Doubtful Nationality," supra* note 10, at 491. *See also* Jeremy Sarkin, *Towards Finding a Solution for the Problems Created by the Politics of Identity in the Democratic Republic of the Congo (DRC): Designing a Constitutional Framework for Peaceful Cooperation, in* POLITICS OF IDENTITY AND EXCLUSION IN AFRICA: FROM VIOLENT CONFRONTATION TO PEACEFUL COOPERATION 67 (Konrad-Adenauer-Stiftung, 2001); *cf.,* Timothy H. Edgar & Michael D. Nicoleau, *Constitutional Governance in the Democratic Republic of the Congo: An Analysis of the Constitution Proposed by the Government of Laurent Kabila*, 35 TEXAS INT'L L.J. 207 (2000) (evoking the problematic ambiguity of "by origin" nationality).

[163] ICERD art. 1(1).

[164] *Accord* Jackson, *Of "Doubtful Nationality," supra* note 10, at 489 (citing SADAKA OGATA, THE TURBULENT DECADE 220, 380 n.37 (2005) (summarizing Opinion of the U.N. Office of Legal Affairs, Communication from Under-Secretary-General for Political Affairs Marrack Goulding to High Commissioner for Refugees Sadaka Ogata (May 24, 1996)) (unfortunately, per emails of Oct. 6, 2020 and Oct. 11, 2020 from the U.N. Office of Legal Affairs to this author, the Opinion remains confidential and not releasable to the public)). *See also* Angèle N. Makombo,

constitutional provision and its corresponding legislation, both explicitly per article 2(1)(c) of the Convention, and also implicitly per article 216 of the Constitution[165] – especially given the Convention's *jus cogens* status, a status acknowledged by the DRC.

There is, however, a potential defense in that subsection 3 to article 1 of the ICERD, on its face, could be read so as to preclude scrutiny of State Party citizenship and naturalization laws. The provision reads:

> Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.[166]

By "bracket[ing] the use of race as a criterion for citizenship,"[167] it appears that article 1(3) "makes it clear" that the Convention may not be applied to State Party laws[168] and, hence, that State Party citizenship and naturalization are exempt from the Convention's reach.[169] Such a

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Civil Conflict in the Great Lakes Region: The Issue of Nationality of the Banyarwanda in the Democratic Republic of the Congo, 5 AFR. Y.B. INT'L L. 49, 58 (1997) (asserting, at the advent of the Transitional Government under Laurent Kabila, that Congolese nationality law was incompatible with "general principles of law" which include "the right to a nationality") (written by a U.N. Dept. of Peace-Keeping Operations Political Affairs Officer, with the caveat that the views expressed therein were "not necessarily those of the United Nations" (*id*. at 49 n.*)).

[165] This provision of the 2006 constitution is substantially the same as article 10 of the DRC's first constitution, adopted in 1964. *See* CONSTITUTION DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO DU 1ER AOUT 1964, 5 MONITEUR CONGOLAIS, special edition, Aug. 1, 1964, at 3, available at https://mjp.univ-perp.fr/constit/cd1964.htm (last visited Nov. 26, 2020). Therefore, it arguably pre-dates the Convention, if indeed the temporal sequence of national and international provisions is relevant. *See* discussion of the Vienna Convention Rules on Treaty Interpretation, *infra* note 241; and discussion of pre- versus post-ratification of treaties, *supra* notes 134-137 and accompanying text.

[166] ICERD art. 1(3).

[167] Peter J. Spiro, *A New International Law of Citizenship*, 105 AMER. J. INT'L L. 694, 716 (2011).

[168] GRO NYSTUEN, ACHIEVING PEACE OR PROTECTING HUMAN RIGHTS? CONFLICTS BETWEEN NORMS REGARDING ETHNIC DISCRIMINATION IN THE DAYTON PEACE AGREEMENT 116 (2005).

[169] *Accord*, Bronwen Manby, *Citizenship and Statelessness in the Member States of the Southern African Development Community*, U.N. HIGH COMMISSIONER FOR REFUGEES 104 (Dec. 2020), https://reliefweb.int/sites/reliefweb.int/files/resources/Statelessness_in_Southern_Africa_Dec2020.pdf . Temple University Professor of Law Peter J. Spiro puts this view in context:

> In its original conception, at least, the Convention was not intended to constrain criteria for admission from outside the existing community. [At that time,] international law had nothing to say about a citizenship regime that had the clear effect of excluding outsiders on the basis of race.

Spiro, *supra* note 167, at 716 n.147 and accompanying text (citing LERNER, *supra* note 147, at 28-32 (orig. ed. 1980)).

reading would be consistent with traditional deference to the sanctity of State sovereignty,[170] especially during the post-colonial liberation era of the Convention's drafting,[171] because determining the parameters of citizenship has, under international law, traditionally been the unique province of the nation-state.[172]

However, interpreting article 1(3) so as to preclude scrutiny of State Party nationality laws would frustrate the ICERD's object and purpose, which is determined by reference to its preamble.[173] In its fifth preambular paragraph, the Convention specifically incorporates[174] the 1963 United Nations Declaration on the Elimination of All Forms of Racial Discrimination,[175] and affirms that States Parties "desir[e] to implement the principles embodied in" the Declaration "and to secure the earliest adoption of practical measures to that end."[176] The Declaration itself

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[170] *See* United Nations Charter art. 2, para. 7, Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 1 U.N.T.S. 16, https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf [hereinafter UN Charter and ICJ Statute, respectively]. *See also* Drew Mahalic & Joan Gambee Mahalic:

> [The subsection was] designed to assure states parties that due respect is given to state sovereignty in areas concerning naturalization.… Naturalization laws have always been considered a prerogative of state sovereignty… Consequently, the limitation provisions articulated in Article 1(3) have generated little controversy and merited only minor attention.

The Limitations Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination, 9 HUM. RTS. Q. 74, 79 & 82 (1987), *quoted in* Spiro, *supra* note 167, at 716 n.145.

[171] *See* PATRICK THORNBERRY, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 157 (2016) ("As the *travaux* suggest, the restrictive approach to non-citizens was to some extent bound up with the necessity of strengthening the sovereignty of newly independent States and nascent problems of the nationalization of resources including personnel.").

[172] Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, Judgment, 1955 I.C.J. 4, 20 (Apr. 6) ("It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality."). *See generally* ALINA KACZOROWSKA, *Nationality, Statelessness, Refugees and Internally Displaced Persons, in* PUBLIC INTERNATIONAL LAW 305, 306-309 (3d ed. 2005).

[173] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Judgment, 2021 I.C.J. __, ¶ 84 (Feb. 4), https://icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf. In the process of discerning the ICERD's object and purpose, the International Court of Justice found it unnecessary to go beyond the treaty's text (*id.*, ¶ 89), in this case its preamble (*id.*, ¶ 84), applying the customary rules of treaty interpretation reflected in articles 31 and 32 of the Vienna Convention on the Law of Treaties, specifically the very first rule: a "'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'" *Id.*, ¶ 78 (quoting Vienna Convention on the Law of Treaties, *supra* note 148, art. 31(1)).

[174] ICERD fifth preambular paragraph.

[175] U.N. Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII) (Nov. 20, 1963) [hereinafter ERD Declaration].

[176] ICERD twelfth preambular paragraph.

admonishes that "particular efforts shall be made to prevent discrimination based on … ethnic origin, especially in the fields of… access to citizenship…"[177]

Moreover, well prior to the Convention, in April 1955, the International Court of Justice had made clear that, despite the sovereign prerogative of citizenship and naturalization, nationality laws nevertheless are subject to international scrutiny when they have "international effect" in their application.[178] The Court recognized, at the time, that "the diversity of demographic conditions ha[d] thus far made it impossible for any general agreement to be reached on the rules relating to nationality."[179] Since then, one rule has emerged: the prohibition of discrimination on the basis of race, including ethnic origin, reflected in ICERD article 5(d)(iii). The ICERD was concluded in July 1966,[180] came into force in January 1969,[181] attained near universal ratification/accession in the following years,[182] and its principles have evolved into *jus cogens* general rules of international law.[183]

Furthermore, the dual use of the term "nationality" in article 1(3) renders the provision ambiguous. Is the term "nationality" as used in the first clause, i.e. synonymously with "citizenship," used similarly in the second? Or rather, in the second clause is "nationality" analogous to the term "ethnicity," as it is in article 1(1)? [184] Very little of the Convention's

[177] ERD Declaration art. 3(1).
[178] Nottebohm Case, 1955 I.C.J. at 21.
[179] *Id.* at 23.
[180] *See* ICERD Table, *supra* note 142.
[181] *Id.*
[182] *Id.*
[183] *See supra* note 147 and accompanying text.
[184] ICERD art. 1(1) (defines the bases of "racial discrimination" to include "national or ethnic origin"). *Accord*, *cf.*, Qatar v. United Arab Emirates, Judgment, 2021 I.C.J. at __, ¶ 105 ("the term 'national origin' in Article 1, paragraph 1, of the Convention does not encompass current nationality.").

travaux préparatoires specifically addresses article 1(3) as such, but it does indicate the latter. As related by Patrick Thornberry[185] in his recent and exhaustive commentary on the ICERD:

> The view that 'nationality' shifts its meaning in [article] 1(3) from the legal concept to a concept closer to ethnicity was expressed by the representative of the UK … who observed, following the voting on the article, that 'nationality' 'was obviously interpreted in different ways in different countries; her delegation understood the word "nationality" as used at the end of the new text…to mean persons of a particular national origin.' The representative of Canada explained that he had voted in favour of [article] 1(3) 'because the text adopted made it clear that individuals could have a nationality on the basis of race as well as citizenship.'[186]

Likewise, the scant academic commentary explicitly discussing article 1(3) *per se* militates for reading its second clause's use of "nationality" as "national origin"[187] – although the earliest of the three commentators demurs, if "'for no other reason than because it ought not to be lightly assumed that within one sentence the same term is given two different meanings.'"[188] Thornberry himself posits that article 1(3) exists to qualify its predecessor, article 1(2), which reads: "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party…between citizens and non-citizens."[189] For Thornberry, article 1(3) serves "as an exception to the exception that reinstates, within its frame, the non-

[185] Member of the U.N. Committee on the Elimination of Racial Discrimination since 2001 (Rapporteur, 2002-2008); Emeritus Professor of International Law at Keele University (Newcastle, UK); Fellow of Kellogg College, University of Oxford. *See* Oxford Univ. Press, https://global.oup.com/academic/product/the-international-convention-on-the-elimination-of-all-forms-of-racial-discrimination-9780199265336?cc=us&lang=en&# (last visited Jan. 20, 2021).
[186] THORNBERRY, *supra* note 171, at 144, nn.35 & 36 (citing U.N. GAOR, 20th Sess., 1307th 3rd Comm. Mtg. at 96-97, ¶¶ 24 & 28, U.N. Doc. A/C.3/SR (Oct. 12, 1965) (internal citation omitted)).
[187] *Id.* at 145, nn.45-46 (citing ION DIACONU, RACIAL DISCRIMINATION 166 (2011), and NATAN LERNER, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION LERNER 30 (1980) (*supra* note 147, at 35 (rev. ed. 2015))).
[188] *Id.* at 145, nn.43-44 (quoting Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMPAR. L.Q. 996, 1009 (1966)).
[189] ICERD art. 1(2).

discrimination principle as applicable among non-citizens when it concerns a particular nationality."[190]

The jurisprudence of the U.N. Committee on the Elimination of Racial Discrimination (CERD or the Committee) bears this out. The CERD is the treaty body established by the Convention[191] to monitor and promote implementation of the Convention through both periodic review of States Parties' practice,[192] and also consideration of complaints – called "communications" – against any given State Party brought by an individual or group of individuals,[193] or another State Party.[194]

At its sixty-fifth session in 2004, the Committee took up the topic of non-citizens, in order to address the plight of so-called foreigners – not only in the sense of refugees and migrants, which it had done in 1993,[195] but also of people whose nationality is questioned even when they "have lived all their lives on the same territory"[196] (such as the Banyamulenge). This General Recommendation (GR) incorporated the 1993 GR, the only one to have addressed article 1(3). The 1993 GR had explained that article 1(3) qualifies article 1(2)'s exemption of those "actions by a State Party which differentiate between citizens and non-citizens" from the definition of racial discrimination, "by declaring that, among non-citizens, States parties may not discriminate against any particular nationality."[197]

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[190] THORNBERRY, *supra* note 171, at 146.
[191] ICERD art. 8.
[192] *Id.,* art. 9.
[193] *Id.,* art. 14.
[194] *Id.,* art. 11.
[195] *See* Comm. on the Elimination of Racial Discrimination [CERD], Gen. Recommendation [GR] No. 11 (on Non-Citizens), U.N. Doc. A/48/18 (Mar. 9, 1993).
[196] Comm. on the Elimination of Racial Discrimination [CERD], Gen. Recommendation [GR] No. 30 (on Discrimination Against Non-Citizens), U.N. Doc. A/59/18 (SUPP), at 93, third preambular para. (Aug. 20, 2004).
[197] CERD GR 11 (on Non-Citizens), *supra* note 195, at 113.

As part of its 2004 update to its GR on non-citizens, the Committee recommended that States Parties "Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."[198] The Committee further recommended that States Parties "[r]eview and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination."[199] If article 1(3) prohibited scrutiny of States Parties' nationality laws, then the 2004 GR would be an absurdity. Indeed, in the sole complaint brought before the CERD in which the respondent State Party raised article 1(3) as a jurisdictional defense, the Committee rejected the defense outright, citing the 2004 GR, and declared the communication admissible.[200]

Furthermore, like article 15 of the Universal Declaration of Human Rights,[201] article 5(d)(iii) of the Convention *does not* purport to *create* the right to nationality. As the Committee

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[198] CERD GR 30 (on Discrimination Against Non-Citizens), *supra* note 196, at 95, ¶ 14. Citing the Banyamulenge's situation, among others, the Open Society Justice Initiative had advocated for such a recommendation at this meeting of the CERD. *Racial Discrimination and the Rights of Non-Citizens: Submission by Open Society Justice Initiative to the UN Committee on the Elimination of Racial Discrimination on the Occasion of its 64th session*, OPEN SOCIETY FOUNDATIONS: OPEN SOCIETY JUSTICE INITIATIVE (February 2004), www.justiceinitiative.org/publications/racial-discrimination-and-rights-noncitizens.

[199] CERD GR 30 (on Discrimination Against Non-Citizens), *supra* note 196, at 94, ¶ 6.

[200] Comm. on the Elimination of Racial Discrimination, Op. Adopted by the Comm. Under Art. 14 of the Convention, Concerning Commc'n No. 53/2013 (Pjetri v. Switzerland), at 13, ¶¶ 6.1-6.4, U.N. Doc. CERD/C/91/D/53/2013 (Jan. 23, 2017) (although not directly attacking the State Party's nationality law as such, complainant alleged that the nationality law as applied adversely affected his access to nationality).

[201] UDHR art. 15, subsection 1 ("Everyone has the right to a nationality."). There was strenuous debate during the Universal Declaration's drafting as to whether it should further describe the right to nationality; notably, whether it should advance a pure *jus soli* principle as the universal norm of nationality acquisition. The first proposed draft of the article illustrates: "No state may refuse to grant its nationality to persons born on its soil of parents who are legitimately present in the country." Draft Declaration of the International Rights and Duties of Man Formulated by the Inter-American Juridical Committee, U.N. Doc. E/CN.4/2 (Jan. 8, 1947), *reprinted in* WILLIAM A. SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE *TRAVAUX PRÉPARATOIRES* 101 (2013). However, the view prevailed that description of the right or its permissible modalities should be deferred to a later convention. The sole exceptions, due to the recent Nazi experience, were the prohibitions on States from withdrawing it arbitrarily or not permitting its change, resulting in subsection 2 of article 15: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." UDHR art. 15(2). *See* records of proceedings of the drafting Committee of the Commission on Human Rights, the Working Group on the Declaration of Human Rights, the

clarified, ICERD article 5's non-exhaustive enumeration of specific human rights represents an "assumption" by States Parties of both "the existence and recognition of these rights."[202] Rather, what the Convention *does* is to "oblige" each State Party "to prohibit and eliminate racial discrimination in the enjoyment of such human rights."[203] Exempting scrutiny of State Party laws which define nationality would allow States Parties to discriminate on the basis of race in the granting of citizenship – prerequisite to its enjoyment – and thus defeat the object and purpose of the Convention.[204]

Moreover, "A distinction" in national law "is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms."[205] An impairing effect will be found if the law "has an unjustifiable disparate impact upon a group distinguished by…ethnic origin."[206] Perhaps, facially, the DRC Constitution's and corresponding nationality law's distinction among ethnic groups on the basis of presence on and possession of territory cannot, in the abstract, be said to "impair" the right to nationality *per se*. However, the *effects* of the law's reference to the ambiguous concepts of an ethnic group's presence on and ownership of territory at any given time, have had and continue to have an unjustifiably disparate impact upon the Banyamulenge.[207]

Commission on Human Rights, the Third Committee (and its Sub-Committee) of the General Assembly, and of the General Assembly, from Jan. 8, 1947 to Dec. 10, 1948, *in* SCHABAS at 98-101, 281-285, 712-715, 746-765, 790-794, 818-823, 1022-1023, 1078-1081, 1107-1109, 1160-1163, 1194-1200, 1287, 1403-1409, 1432-1434, 1567-1572, 1754-1764, 2434-2458, 2487, 2931 & 3072-3099.

[202] Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 20 (on Art. 5 of the Convention), U.N. Doc. A/51/18, at 124, ¶ 1 (Mar. 8, 1996).

[203] *Id.*

[204] Although affirmative "special measures" to grant nationality may be remedially warranted, and are thus permitted under articles 1(4) and 2(2) of the Convention. *See generally* Comm. on the Elimination of Racial Discrimination [CERD] Gen. Recommendation, [GR] No. 32 (on the Meaning and Scope of Special Measures), U.N. Doc. CERD/C/GC/32 (Sep. 24, 2009).

[205] Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 14 (on Art. 1(1) of the Convention), U.N. Doc. A/48/18, at 115, ¶ 1 (Mar. 17, 1993).

[206] *Id.,* ¶ 2

[207] In this vein, a separate cause of action based on ICERD art. 5(d)(iii) arguably arose when DRC President Tshisekedi, in late September 2020, annulled the establishment of the Rural Commune of Minembwe and cancelled

In practice before the CERD, it is noteworthy that the Government of the DRC itself recognizes that article 1(3) does not prohibit scrutiny of its nationality laws, insofar as the DRC submitted those laws, *inter alia*, for the Committee's consideration in its most recent (2006) Periodic Report submitted per article 9 of the Convention.[208] The Committee in fact scrutinized those laws, albeit perfunctorily, and in its Concluding Observations noted its concern "that in practice Congolese nationality is particularly difficult to acquire by members of [the Banyarwanda] group."[209] No mention whatsoever was made of article 1(3).[210] The Committee also invited the Government of the DRC "to ensure that the application of [its nationality laws] do not give rise to discrimination in the enjoyment of the right to nationality by members of certain ethnic groups residing within its territory (art. 5 (d) (iii))."[211] Moreover, the Committee "note[d] with concern that …there is no definition of racial discrimination in domestic law that reflects the definition given in article 1 of the Convention."[212] The Committee therefore

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the installation of a civic center. *See supra* notes 76-82 and accompanying text. In doing so, he withdrew from the principal concentration of Banyamulenge its expectation that it would finally receive the means by which it could realize its enjoyment of the right to Congolese citizenship: being able to apply for and receive essential governmental documentation such as birth, marriage and death certificates, etc. Instead, the nearest civic center is a three-day walk, through hostile territory. *Supra* note 74. Commentators refer to such remote geographic separation from essential civic services as *de facto* statelessness, "insofar as they cannot be considered to be receiving the rights and responsibilities normally associated with nationality." Francis M. Deng, *Ethnic Marginalization as Statelessness: Lessons from the Great Lakes Region of Africa*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES, 183, 187 (2001) (citing Carol A. Batchelor, *Stateless Persons: Gaps in International Protection*, 7 INT' J. REFUGEE L. 231, 233 (1995)). *See also* Cawo M. Abdi, & Erika Busse, *Condemned to a Protracted Limbo? Refugees and Statelessness in the Age of Terrorism, in* ROUTLEDGE INTERNATIONAL HANDBOOK OF MIGRATION STUDIES 294, 300-302 (Jacqueline Maria Hagan & Holly Straut-Eppsteiner eds., 2019); BRAD K. BLITZ & MAUREEN LYNCH, *Statelessness and the Deprivation of Nationality*, *in* STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 3 & 6-7 (2011). The retraction of Rural Commune status may also, arguably, have violated ICERD article 5(c), the right "to take part in the Government…and to have equal access to public service" (although many Banyamulenge have and do partake in government and public service).

[208] *See* Comm. on the Elimination of Racial Discrimination, Fifteenth Periodic Report of the Democratic Republic of the Congo, U.N. Doc CERD/C/COD/15, at 10, 12 & 16, ¶¶ 40, 41, 51, 71 & 72 (Aug. 3, 2006).

[209] Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Fifteenth Periodic Report of the Democratic Republic of the Congo, U.N. Doc A/62/18 (SUPP), at 66, ¶ 331 (Aug. 17, 2007) (brackets in original).

[210] *Id.*

[211] *Id.*

[212] *Id.* at 65, ¶ 326. Monism notwithstanding.

recommended that the DRC "take the necessary legislative measures to adopt in domestic law a definition of racial discrimination that is fully consistent with article 1 of the Convention."[213]

Therefore, compliance in good faith with the Committee's recommendation requires revising article 10 of the DRC Constitution and the corresponding nationality law, so as to eliminate all reference to ethnicity in defining nationality by origin. More than half a century has elapsed since the ICERD's inception. More than a decade ago "the view ha[d] emerged that the prohibition of discrimination [under the Convention] applies fully to nationality legislation."[214] Just this year (2021) the International Court of Justice declared the Convention's object and purpose as being:

> to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics… [by] eliminat[ing] all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth.[215]

Because the Convention "is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society,"[216] it is now time to leverage the ICERD and jettison the criterion of ethnicity entirely from the laws of nationality.

b. The International Covenant on Civil and Political Rights (1966)

i. Right to Nationality

Still known as Zaire, the DRC acceded to the International Covenant on Civil and Political Rights (ICCPR or Covenant)[217] on November 1, 1976 and, as with the ICERD

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[213] *Id.*
[214] INETA ZIEMELE, STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA: PAST, PRESENT AND FUTURE AS DEFINED BY INTERNATIONAL LAW 294 (2005), *quoted by* Spiro, *supra* note 167, at 722 n.176.
[215] Qatar v. United Arab Emirates, Judgment, 2021 I.C.J. at __, ¶ 86.
[216] CERD GR 32, *supra* note 204, at 2, ¶ 5. *See generally* DAVID KEANE AND ANNAPURNA WAUGHRAY, *Introduction, in* FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT 14-23 (2017).
[217] *Supra* note 140.

preceding it, did so without lodging any reservation, understanding or declaration, and has not made any since.[218] Unlike the ICERD, the ICCPR does *not* enumerate the right to nationality. The Convention explicitly mentions the right to nationality only indirectly, in discussing the rights of the child.[219] Nevertheless, article 16 of the Covenant directs that "Everyone shall have the right to recognition everywhere as a person before the law,"[220] implementing verbatim article 6 of the Universal Declaration of Human Rights.[221] The Covenant further directs, at article 26, that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law,"[222] implementing nearly verbatim article 7 of the Universal Declaration of Human Rights.[223]

The modern world politically organizes all of humankind into independent sovereign nation-states, and tasks nation-states with the enforcement of all rights, including human rights; consequently, the individual must look to the nation-state for vindication of his or her rights.[224] It follows, necessarily, that an individual's entitlement to the protection of a nation-state derives from his or her nationality: as the International Court of Justice remarked in 1955, "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection."[225] Although this speaks to protection on the international plane, the

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[218] *See International Covenant on Civil and Political Rights, Table of Participants, Dates of Signatures & Ratifications, Declarations & Reservations, and Objections* [ICCPR Table], U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no= IV-4&chapter=4&clang=_en (last visited Jan. 28, 2021).
[219] ICCPR art. 24(3) ("Every child has the right to acquire a nationality.").
[220] ICCPR art. 16.
[221] UDHR art. 6.
[222] ICCPR art. 26.
[223] UDHR art. 7, cl. 1 ("All are equal before the law and are entitled without any discrimination to equal protection of the law.").
[224] *See generally* Ed Bates, *History*, *in* INTERNATIONAL HUMAN RIGHTS LAW 3-21 (Daniel Moeckli et al. eds., 3d ed. 2018); CASSESE, *supra* note 130, at 3-4 & 142-150; LOUIS HENKIN, *Rights in a World of States*, *in* THE AGE OF RIGHTS 43-50 (1990).
[225] Nottebohm Case, 1955 I.C.J. at 13 (quoting The Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), 1938 P.C.I.J. (ser. A/B) No. 76, at 16, [¶ 65] (Feb. 28)). In the earlier case, the Permanent Court of International Justice (predecessor to the International Court of Justice) continued:

Court pointed out that the effects of nationality extend to and are especially relevant in the domestic sphere:

> Nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants or imposes on its nationals.[226]

As one African commentator from Benin recently put it, "*l'acquisition de la nationalité est la première image de l'existence juridique de l'être humain.*"[227]

Thus, in this world of independent sovereign nation-states, deprivation of one's nationality equates to "the total destruction of the individual's status in society."[228] Although the nation-state exercises exclusive jurisdiction over defining the parameters of its nationality, once conferred the right is inalienable.[229] U.S. Chief Justice Earl Warren even proclaimed that to take away one's citizenship would amount to a "form of punishment more primitive than torture."[230] As he explained:

> Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.

Panevezys-Saldutiskis Railway Case, *id*.

[226] Nottebohm Case, 1955 I.C.J. at 20. The Court concludes the paragraph with the sentence "This is implied in the wider concept that nationality is within the domestic jurisdiction of the State." *Id.*

[227] "Acquisition of nationality is the first manifestation of the human being's legal existence" (author's translation). Renaud Fiacre Avlessi, *La Prévention de l'Apatridie dans le Système Africain des Droits de l'Homme [The Prevention of Statelessness in the African Human Rights System]*, 3 AFR. HUM. RTS. Y.B. 276, 286 (2019). Avlessi's use of the phrase "première image" waxes poetic: it makes this author think of the first sight seen by a newborn, or to an ultrasound image as a parent's first glimpse of his or her child.

[228] Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that the Eighth Amendment of the U.S. Constitution prohibits punitive denationalization, finding it to be a cruel and unusual form of punishment). *Contra*, Kim Rubenstein, *Globalization and Citizenship and Nationality*, *in* JURISPRUDENCE FOR AN INTERCONNECTED GLOBE 171-172 (Catherine Dauvergne ed., 2003) ("Citizenship is no longer legitimately the major foundation upon which rights are restricted and determined, even within the Nation-State") (*quoted in* Spiro, *supra* note 167, at 719 n.167).

[229] 356 U.S. at 93 ("As long as a person does not voluntarily renounce or abandon his citizenship…his fundamental right of citizenship is secure."). *But see* Rogers v. Bellei, 401 U.S. 815, 828 (1971) (exception for U.S. citizens neither born nor naturalized in the U.S. hence not protected under the Fourteen Amendment), *discussed in* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC 177 (2013).

[230] 356 U.S. at 101.

> [Denationalization] destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself.[231]

"In short," as the Chief Justice famously concluded, the right to a nationality equates to "the right to have rights."[232]

The political philosopher Hannah Arendt had coined the phrase a few years earlier, while discussing statelessness in the context of the massive European refugee flows, forced population transfers and genocide during the recent World War.[233] As she explained, for those deprived of nationality, "their plight is not that they are not equal before the law, but that no law exists for them."[234] Over half a century later, commentators continue to observe that "[a]lthough 'Everyone has the right to recognition everywhere as a person before the law,' it is precisely lack of such recognition that generates many of the problems the stateless face."[235] "Without citizenship in at least one state, it is impossible to enjoy most human rights; indeed, some stateless people are even enslaved."[236] As the African Court on Human and Peoples' Rights

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[231] *Id.*
[232] 356 U.S. at 102. This quasi-maxim from Chief Justice Warren is "often-quoted" in the literature on statelessness and deprivation of nationality. Deng, *supra* note 207, at 185 (citing Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status,* 10 INT'L J. OF REFUGEE L. 156, 159 (1998)).
[233] HANNAH ARENDT, *The Decline of the Nation-State and the End of the Rights of Man*, *in* THE ORIGINS OF TOTALITARIANISM 267 (2d ed. 1958) (1951). She had first published her essay "in the 1949 summer issue of the short-lived American labor movement magazine MODERN REVIEW*"* under the title "'The Rights of Man': What Are They?" STEPHANIE DEGOOYER ET AL., *Nothing But Human: On "The Right to Have Rights"*, *in* THE RIGHT TO HAVE RIGHTS (2018), excerpted at https://www.versobooks.com/blogs/3663-nothing-but-human-on-the-right-to-have-rights (last visited Jan. 27, 2021).
[234] ARENDT, *supra* note 233, at 295-296.
[235] Kristy A. Belton, *Statelessness: A Matter of Human Rights*, *in* THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT 37 (Rhoda E. Howard-Hassmann et al. eds., 2015) (quoting UDHR art. 6 (internal citation omitted), which ICCPR article 16 tracks nearly verbatim).
[236] Rhoda E. Howard-Hassmann, *Introduction: The Human Right to Citizenship*, *in* THE HUMAN RIGHT TO CITIZENSHIP, *id. at* 4; *see also* Laura van Waas, *Nationality and Rights*, *in* STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 23 (Brad K. Blitz & Maureen Lynch eds., 2011).

recently explained, nationality provides "the capacity to enjoy rights and exercise obligations, … since it is the legal and socio-political manifestation of the right" to legal personality.[237]

Therefore, the guarantees under international law to everyone of recognition everywhere as a person before the law, and to all persons of equality before the law, reflected in articles 16 and 26 of the Covenant,[238] respectively, imply by necessity that the Covenant also guarantees the right to nationality. The jurisprudence of the United Nations Human Rights Committee (HRC or Human Rights Committee)[239] bears this out, both in its two General Comments which touch on deprivation of nationality, and also in its "views" issued in the two "communications"[240] brought before it which addressed the right to nationality.

In late 1989, by way of interpreting ICCPR article 26's principle of non-discrimination, the Human Rights Committee interpreted the Covenant as incorporating the terms of the earlier ICERD.[241] As the HRC noted in its General Comment No. 18 on Non-Discrimination:

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[237] Robert John Penessis v. Tanzania, No 013/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. Hum. Peoples' Rts.], ¶ 89 (Nov. 28, 2019), https://www.african-court.org/cpmt/details-case/0132015, (quoting Open Society Justice Initiative v. Côte d'Ivoire, Communication 318/06, African Commission on Human and Peoples Rights [Afr. Comm'n Hum. Peoples' Rts.], at 25-26, ¶¶ 95-97 (May 27, 2016), https://www.achpr.org/ sessions/ descions?id=228)).

[238] ICCPR arts. 16 & 26.

[239] The treaty body established by Part IV of the ICCPR, articles 28-45, to monitor and promote implementation of the Convention, much like the CERD with regard to the ICERD (*supra* notes 191-194 and accompanying text).

[240] In the language of practice before international treaty bodies, a complaint brought before a treaty body, such as the Human Rights Committee, is called a "communication;" the official document memorializing the body's deliberations on the communication, containing its opinions, recommendations, etc., is called its "views."

[241] This at first appears to be an incongruous application of the rules of treaty interpretation: using an *earlier* treaty to interpret the terms of a *later* one, instead of the other way around. *See* Vienna Convention on the Law of Treaties [VCLT], *supra* note 148, art. 31(3)(a) ("There shall be taken into account, together with the context… any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."). *See generally* Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, *in* THE OXFORD GUIDE TO TREATIES, *supra* note 128 [OXFORD GUIDE], at 459; Christopher J. Borgen, *Treaty Conflicts and Systemic Fragmentation*, *in* OXFORD GUIDE at 438. However, this is not an instance of conflicting terms in need of resolution. Nor are the two treaties bi- or trilateral technical pacts. Rather, they are multilateral normative instruments implementing and promoting human rights. As such, they are subject to the "overarching approach to human rights treaty interpretation" of "effectiveness," meaning that "each and every treaty provision" must be given "effect rather than no effect" by way of "either a teleological or an evolutive approach to interpretation (or a combination of both)." Başak Çali, *Specialized Rules of Treaty Interpretation: Human Rights*, *in* OXFORD GUIDE at 512-513 (internal citations omitted). Moreover, practice has proven the effectiveness approach not to be incompatible with the VCLT. As Professor Çali observes, "In human rights treaty interpretation we find that interpreters have developed all aspects of effectiveness, often in tandem with each other, in conversation with the

> The Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the [ICERD] provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[242]

Moreover, ICCPR article 26 does not limit the scope of rights protected against discrimination. Rather,

> it prohibits discrimination [as defined by the ICERD] in law or in fact in any field regulated and protected by public authorities…. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[243]

Furthermore, "when legislation is adopted by a State [P]arty, it must comply with the requirement of article 26 that its content should not be discriminatory."[244]

It follows, therefore, that upon discovery of an incompatibility with the non-discriminatory requirement of ICCPR article 26, a State Party should amend extant legislation in order to cure the violation. Fifteen years after its General Comment No. 18, the HRC made this clear in its General Comment No. 31, on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant:

> Article 2, paragraph 2, [of the Covenant] requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order…. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or

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VCLT." *Id.* at 513. *See also* Eirik Bjorge & Robert Kolb, *The Interpretation of Treaties Over Time*, *in* OXFORD GUIDE at 489.

[242] Hum. Rts. Comm., Gen. Comment No. 18 (on Non-Discrimination), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 2, ¶ 6 (Nov. 10, 1989).

[243] *Id.* at 3, ¶ 12.

[244] *Id.*

> practice be changed to meet the standards imposed by the Covenant's substantive guarantees.[245]

Furthermore, States Parties must amend their laws promptly upon discovery of prohibited discriminatory effect. Bringing domestic law into compliance with the Convention is not a mere goal to be achieved progressively,[246] like economic, social or cultural rights:

> The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.[247]

The Human Rights Committee went even so far as to say that:

> the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.[248]

In addressing the two individual communications brought before it in which the authors[249] alleged violations of the Covenant due to denial of citizenship,[250] the Human Rights Committee indicated – albeit indirectly – that the Covenant does encompass the right to nationality. Both cases were brought against Estonia, by persons who had served in the Soviet military during the time Estonia was part of the Soviet Union. Both authors alleged unlawful discrimination on the basis of their membership in a social group (i.e., former Soviet military officers), in the application of Estonian nationality law denying them Estonian citizenship, on

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[245] Hum. Rts. Comm., Gen. Comment No. 31 (on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), *supra* note 136, at 5, ¶ 13.
[246] *See* article 2(1) of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.
[247] Hum. Rts. Comm., Gen. Comment No. 31, *supra* note 136, at 6, ¶ 14.
[248] *Id.* at 7-8, ¶ 19.
[249] Meaning the complainants, in international treaty body practice parlance.
[250] Hum. Rts. Comm., Views, Commc'n No. 1136/2002 (Borzov v. Estonia), U.N. Doc. CCPR/C/81/D/1136/2002 (Aug. 25, 2004); Hum. Rts. Comm., Views, Commc'n No. 1423/2005 (Šipin v. Estonia), U.N. Doc. CCPR/C/93/D/1423/2005 (Aug. 4, 2008).

national security grounds.[251] In both cases, Estonia replied, *inter alia*, that the communications were not "admissible"[252] because the Covenant does not expressly mention the right to nationality.

In the first communication, Estonia asserted that "the right to citizenship, much less [to] a particular citizenship, is not contained in the Covenant."[253] The HRC rejected Estonia's position, observing that:

> the author has not advanced a free-standing right to citizenship, but rather the claim that the rejection of his citizenship on the national security grounds advanced violates his rights to non-discrimination and equality before the law. These claims fall within the scope of article 26 and are, in the Committee's view, sufficiently substantiated for purposes of admissibility.[254]

In the second case a few years later, Estonia went further, asserting "that the communication is manifestly ill-founded," because "the right to citizenship is neither a fundamental right nor a Covenant right."[255] The HRC tersely rejected this, simply stating that it "does not find the State Party's argument persuasive and finds that the author's claims are sufficiently substantiated, for purposes of admissibility."[256]

Regrettably, the Human Rights Committee, in its views on these two communications, did not affirmatively state that the Convention implicitly contains the right to nationality. But the two authors had not placed that question before the HRC. Rather, during its *in limine* defense, the State Party asserted the proposition in the negative: that the right to nationality is not

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[251] *Id.* A third, similar, case against Estonia was brought during the same time frame alleging denial not of citizenship, but of permanent residency, with a similar result: Hum. Rts. Comm., Views, Commc'n No. 1223/2003 (Tsarjov v. Estonia), U.N. Doc. CCPR/C/91/D/1223/2003 (Nov. 14, 2007).
[252] In other words, that the HRC lacked subject matter jurisdiction to hear the complaints.
[253] Borzov v. Estonia, *supra* note 250, at 5, ¶ 4.6.
[254] *Id.* at 9, ¶ 6.6. On the merits, however, the HRC held that the national security grounds advanced by Estonia were permissible under the circumstances, and found no violation of the Covenant. *Id.* at 9-10, ¶¶ 71.-8.
[255] Šipin v. Estonia, *supra* note 250, at 5, ¶¶ 4.1 & 4.3.
[256] *Id.* at 8, ¶ 6.2. Again, however, the HRC decided for the State Party on the merits. *Id*. at 9, ¶ 8.

contained in the Covenant. This the HRC squarely addressed, and firmly rejected. When the proposition will be put affirmatively before the HRC – such as when asked to examine article 10 of the DRC Constitution[257] for compatibility with articles 16 and 26 of the (ICERD-incorporated) Covenant – the Human Rights Committee should state affirmatively that the Covenant implicitly guarantees to everyone the right to a nationality.

ii. Right to Life

As a final note on the Covenant's application, the Human Rights Committee recently pronounced that the right to life, ICCPR article 6(1),[258] "should not be interpreted narrowly."[259] The HRC explained that, in addition to freedom "from acts and omissions that are intended or may be expected to cause unnatural or premature death," the right to life "concerns the entitlement of individuals" "to enjoy a life with dignity."[260] Security in one's nationality is a basic element of human dignity.[261] The African Court on Human and Peoples' Rights, even, has explicitly so held.[262]

As long as ethnicity forms the basis of Congolese nationality, and given the Congo's history of citizenship deprivation on the basis of ethnic group,[263] members of an ethnic group

[257] DRC CONST. art. 10, ¶ 2, cl. 2 (text appearing *supra* note 20).
[258] ICCPR art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").
[259] Hum. Rts. Comm., Gen. Comment No. 36 (2018) on Article 6 of the ICCPR, on the Right to Life, U.N. Doc. CCPR/C/GC/36, at 1, ¶ 3 (Oct. 30, 2018).
[260] *Id.*
[261] *See generally* Brad K. Blitz, *Statelessness and Cultural Security, in* HANDBOOK OF CULTURAL SECURITY 167 (Yasushi Watanabe ed., 2018); *see also* Linda Bosniak, *Citizenship Denationalized*, 7 INDIANA J. GLOBAL LEGAL STUDIES 447 (2000).
[262] Penessis v. Tanzania, https://www.african-court.org/cpmt/details-case/0132015, at 23, ¶ 87 ("The Court holds that the right to nationality is a fundamental aspect of the dignity of the human person.").
[263] *See* discussion *supra* section II. This history is even acknowledged in the Preface ("Exposé des Motifs") to the current DRC law on nationality. 45 OFFICIAL GAZETTE OF DEM. REP. CONGO, special issue, Nov. 17, 2004, at i-v.

repeatedly accused of being "not Congolese"[264] cannot feel secure in their nationality.[265] As Congolese National Assemblyman and Munyamulenge politician Moïse Nyarugabo recently stated during an interview, the Banyamulenge can never feel secure so long as the sovereign "is able to give nationality to whom it wishes in the morning, and to take it away in the evening, to and from whom it wishes."[266] Ghent University Professor of History and Congo specialist Gillian Mathys elaborates:

> [M]any Kinyarwanda-speakers, and especially Congolese Tutsi, do not feel reassured by the current law because their citizenship is still often contested in local contexts and their citizenship has been switched on and off opportunistically for political reasons in the past.[267]

In other words, the constitutional provision continuously undermines the Banyamulenge's human dignity.[268] In this sense, therefore, article 10 of the Congolese Constitution also violates the right to life itself, in contravention of ICCPR article 6.

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[264] *See* UNJHRO Mar. 2021, *supra* note 14 (continuing calls to expel or exterminate Banyamulenge "non-originals" or "foreigners," even by politicians).

[265] *See* Koko, *supra* note 9, at 69 ("the different unresolved issues and ambiguities [the nationality law] contains could be exploited by stakeholders on all sides…").

[266] Emilie Mboyo, *Moïse Nyarugabo révèle le dessous des cartes de l'affaire Minembwe et invite l'Etat à organiser la cité [Moise Nyarugabo Flips the Cards on the Minembwe Affair and Invites the State to Establish the Municipality],* ZOOMECO (Oct 30, 2020), https://zoom-eco.net/a-la-une/rdc-moise-nyarugabo-revele-le-dessous-des-cartes-de-laffaire-minembwe-et-invite-letat-a-organiser-la-cite/ (YouTube link embedded). *See also* J.C. Mwenu, *Affaire "Congolité des Banyamulenge": ne pas Ouvrir, de Nouveau, la Boîte de Pandore [The "Congoleseness of the Banyamulenge"Affair: Don't Open Pandora's Box Again]*, ACTUALITE.CD (Jan. 28, 2020, 9:55 AM), https://actualite.cd/2020/01/28/affaire-congolite-des-banyamulenge-ne-pas-ouvrir-de-nouveau-la-boite-de-pandore.

[267] Mathys, *supra* note 11, at 476 (citing Jackson, *Of "Doubtful Nationality," supra* note 10, at 487).

[268] *Cf.*, Chidi Anselm Odinkalu, *Natives, Subjects and Wannabes: Internal Citizenship Problems in Postcolonial Nigeria, in* THE HUMAN RIGHT TO CITIZENSHIP, *supra* note 235, at 97. Odinkalu explains:

> This rendition of citizenship premises it on a nonexistent clarity of dating of original migration, or on what one writer has described as a journey into "the nebulous, immemorial regions of time." The organic linkage of citizenship with indigeneship sustains the notion of "settler" communities which are then regarded both as existing at the sufferance of the indigenes and, in times of trouble or limited resources, as ultimately expendable.

Id. at 103 (quoting Theophilu Okere, *Keynote Address*, *in* THE IGBO ORIGIN QUESTION, PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM, ORGANIZED BY THE WHELAN RESEARCH ACADEMY, OWERRI, NIGERIA 1, 3 (T. I. Okere ed., 2010)).

c. The African Charter on Human and Peoples' Rights (1981)

On July 28, 1987, the DRC, again still known as Zaire, ratified the African Charter on Human and Peoples' Rights (African Charter or Charter),[269] with effect from October 28, 1987.[270] Like article 16 of the ICCPR, the Charter, at its article 5, espouses the right of everyone to be recognized as a person before the law.[271] But the African Charter goes deeper than the Covenant, by closely associating the individual's right to legal status – or "juridical personality"[272] – with human dignity itself:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of legal status.[273]

Moreover, in its article 2, the Charter also prohibits discrimination in the enabling and effectuation of rights, notably racial discrimination.[274] Unlike the Covenant, however, the African Charter affirmatively mentions "ethnic group" as a prohibited basis of discrimination, nesting it between "race" and "color:"

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, coulour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.[275]

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[269] Afr. Charter, *supra* note 141.
[270] Afr. Charter, Table of Ratification and Adherence, 1520 U.N.T.S. at 245 n.1.
[271] Afr. Charter art. 5, cl. 1; *compare with* ICCPR art. 16 (text accompanying note 220, *supra*).
[272] *See* The Nubian Community in Kenya v. The Republic of Kenya [Nubian Community v. Kenya], Communication 317/2006, African Commission on Human and Peoples' Rights [Afr. Comm'n Hum. Peoples' Rts.], ¶ 138 (May 30, 2016), https://www.achpr.org/sessions/descions? id=229:

> In the French version of the Charter, "legal status" is translated as "personalité juridique" or "juridical personality," which accords more with the terminology used in other human rights instruments. Juridical personality and legal status are therefore used interchangeably in the present Communication.

Id. at 28 n.47.
[273] Afr. Charter art. 5, cl. 1.
[274] Afr. Charter art. 2.
[275] *Id.*

Furthermore, the object and purpose of the African Charter includes the "dismantling" of "all forms of discrimination, particularly those based on race, ethnic group, colour," etc., as expressed in its preamble.[276]

Like the ICCPR, the African Charter does not explicitly mention the right to nationality.[277] However, the Charter is an exceptionally inclusive instrument, mandating in its article 60 that its interpreters – notably, the African Commission on Human and Peoples' Rights (the Commission)[278] – look to other international human rights instruments:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of … the Universal Declaration of Human Rights [and] other instruments adopted by the United Nations and by African countries…as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.[279]

Moreover, "to determine principles of law" which apply to it, the Charter further mandates in article 61 that:

> The Commission shall also take into consideration other general or special international conventions, … African practices consistent with international norms on human and peoples' rights, customs

[276] Afr. Charter ninth preambular paragraph.
[277] Apparently, this omission was not an oversight, but deliberate: a first draft of the Charter would have addressed acquisition of nationality, but the topic was rejected as contrary to promotion of a unified, single African people. Avlessi, *supra* note 227, at 283. Over two decades later, however, the Commission firmly and unequivocally re-affirmed the "strict respect for the inviolability of borders and the obligation to preserve the territorial integrity of State Parties," and deference to the Nation State on "the question of citizenship or nationality." Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Afr. Comm'n Hum. Peoples' Rts., ¶¶ 6 & 31 (May 2007), https://www.achpr.org/presspublic/publication?id=49. This Advisory Opinion does, however, borrow from the lexicon of Pan-Africanism to state that each individual African person is indigenous to the Continent of Africa as a whole (in retort to the Human Rights Council, the sponsor of subject Declaration, which had promoted the self-determination of indigenous peoples whose populations, especially in Africa, often straddle international borders). *Id.*, ¶ 13.
[278] The treaty body established in Part II of the African Charter (articles 30-63) to monitor and promote implementation of the Charter, much like the CERD for the ICERD and the HRC for the ICCPR: "to promote human and peoples' rights and ensure their protection in Africa" (quoting Afr. Charter art. 30).
[279] Afr. Charter art. 60.

> generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.[280]

Due to article 60 expressly invoking the Universal Declaration of Human Rights (UDHR), the African Court on Human and Peoples' Rights (African Court) held in late 2019 that the African Charter encompasses the right to nationality as articulated by UDHR article 15,[281] and that the Charter guarantees it via Charter article 5.[282] The Organization of African Unity, now known as the African Union, had established the African Court in 1998, so as "to complement and reinforce the functions of the African Commission" judicially,[283] able to render binding findings as well as recommendations.[284] After many years eschewing its jurisdiction, the DRC recently recognized the African Court's authority,[285] by ratifying the Protocol to the Charter establishing the Court, on December 8, 2020.[286]

Regardless of whether the entire world views the UDHR as having crystallized into an actionable instrument binding upon all States,[287] the African Court has "recognized [it] as

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[280] *Id.*, art. 61. As if this were not enough, the African Commission has also embraced the doctrine of implied rights, although it has utilized the tool with regard to a communication only once, in 2001. *See* VILJOEN, *supra* note 131, at 327-328, discussing Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria [Ogoniland Case], Communication 155/96, Afr. Comm'n Hum. Peoples' Rts., (Oct. 27, 2001), https://www.achpr.org/sessions/descions?id=134 (finding the right to food implicit in the express rights to life (Afr. Charter, art. 4), health (art. 16) and economic, social and cultural development (art. 22) (Ogoniland Case, ¶¶ 59-63); the right to adequate housing implicit in the rights to property (art. 14), health (art. 16) and the integrity of the family (art. 18(1)) (*id*., ¶¶ 64-66); and even the right "to be let alone and to live in peace" implicit in the implied right to adequate housing (*id*., ¶ 61)).

[281] *See* UDHR art. 15.

[282] Penessis v. Tanzania, https://www.african-court.org/cpmt/details-case/0132015, ¶ 168(v).

[283] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, June 9, 1998, O.A.U. Doc. OAU/LEG/EXP/ AFCHPR/PROT (III), https://www.africancourt.org/en/images/Basic%20 Documents/ africancourt-humanrights.pdf, eighth preambular paragraph [hereinafter Afr. Ct. Protocol].

[284] *See generally* VILJOEN, *supra* note 131, at 414-420.

[285] Although the DRC has *not* made the necessary Declaration under article 34(6) of the Charter permitting the Court to accept complaints against the DRC from individuals and NGOs. Press Release, *Democratic Republic of Congo Ratifies the Protocol on the Establishment of the African Court on Human and Peoples' Rights*, AFR. CT. HUM. PEOPLES' RTS., Dec. 11, 2020, https://www.african-court.org/wpafc/democratic-republic-of-congo-ratifies-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights/.

[286] *Id*.

[287] *See generally* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317-354 (1996). The practical conclusion of Professor Hannum's magisterial survey remains current, as restated some twenty years later:

forming part of Customary International Law."[288] Moreover, the DRC Constitution itself, if not outright incorporating the UDHR, nevertheless "reaffirms" the Congo's "adhesion and attachment" to it.[289] For the African Court, because of the UDHR's status as customary international law, and because "everyone shall have a right to nationality" under UDHR article 15, the Court deems that the right to nationality "applies" as a "binding norm."[290] This is due, first, to "the right to nationality" being "a fundamental aspect of the dignity of the human person."[291] And, second, because "the expression 'legal status' under Article 5 of the Charter encompasses the right to nationality."[292] Per the African Court, therefore, "Article 5 of the Charter and Article 15 of the Universal Declaration of Human Rights" "guarantee" the right to nationality.[293]

> Merely stating that the [UDHR] is legally binding does not make it so….[W]hat counts primarily is the actual practice of states, in one form or another, demonstrating uniformity of expectation among them consistent with the Declaration, or states' explicit recognition that the Declaration's norms reflect general principles of law.

HURST HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 143 (6th ed. 2018).

[288] Anudo Ochieng Anudo v. Tanzania, No. 012/2015, Judgment, Afr. Ct. Hum. Peoples' Rts., ¶ 76 (Mar. 22, 2018), https://www.african-court.org/cpmt/details-case/0122015 (citing Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3[, 42] (May 24) [(The UDHR "enunciates" "fundamental principles" of international law)], *and, [cf.,]* Matter of South-West Africa (Ethiopia v. South Africa, Liberia v. South Africa), Preliminary Objections, 1962 I.C.J. 319[, 358-360] (Dec. 21) (Bustamente, J., separate opinion) [(the "declaration" of an international trusteeship constitutes an "agreement" among its parties to abide by its terms)]).

[289] DRC CONST. fifth preambular paragraph ("Réaffirmant notre adhésion et notre attachement à la Déclaration Universelle de Droits de l'Homme…").

[290] Penessis v. Tanzania, https://www.african-court.org/cpmt/details-case/0132015, ¶ 85.

[291] *Id.*, ¶ 87 (expressly so holding).

[292] *Id.,* ¶ 89.

[293] *Id.,* ¶ 168(v). Accordingly, the African Court found violations not only of the African Charter, but also of the UDHR – a separate instrument. This is an extraordinary exercise of jurisdiction. Granted, the Court's constitutive act defines the sources of law which the "Court shall apply" as "provisions of the Charter and any other human and peoples' rights instruments ratified by the States concerned." Afr. Ct. Protocol art. 7. But nowhere does the Protocol expressly grant jurisdiction *to adjudge* violations of those "other human rights instruments" themselves. Such authority is found, apparently, in the Protocol's ambiguity: the Court simply "shall make appropriate orders" if it "finds that there has been a violation of a human or peoples' right." *Id.*, art. 27 (on Findings). As the Court is to "complement the protective mandate of the African Commission" (*id.*, art. 2), this practice of the Court arguably may enable a claimant before the Commission to request findings of violation not only of the Charter, but also of those "other general or special international conventions" (Afr. Charter art. 61), such as the ICERD and the ICCPR. *See infra* section III.B.2.

The African Commission, for whose work the Court exists "to complement and reinforce,"[294] had opined in 2016 that article 5 of the Charter encompasses the right to nationality, albeit not (necessarily) on the basis of the UDHR. Rather, for the Commission it was founded on the attributes of "legal status" invoked in article 5: that is, "the ability of an individual to have rights and obligations," of which nationality is "a basic component" because "it is the legal and socio-political manifestation" of legal status.[295, 296] The year prior, the Commission had "agreed with the position espoused" by the Inter-American Court of Human Rights, which the Commission described as having held "that nationality (or citizenship) is a prerequisite for recognition of juridical personality,"[297] and therefore that "a claim to citizenship or nationality as a legal status is protected under Article 5 of the Charter."[298]

The question originally came to the Commission's attention through complaints of arbitrary denial of nationality, mass expulsions of non-nationals, and resulting statelessness, which the Commission viewed through the lens of human dignity: "forcing people to live as stateless persons…constitutes a violation of the dignity of a human being. Thereby violating

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[294] *See* Afr. Ct. Protocol eighth preambular paragraph.

[295] Open Society Justice Initiative [OSJI] v. Côte d'Ivoire, Communication 318/06, African Commission on Human and Peoples Rights [Afr. Comm'm Hum. Peoples' Rts.], ¶¶ 96-97 (May 27, 2016), https://www.achpr.org/sessions/descions?id=228).

[296] This harkens to the "right to have rights" characterization of nationality made by Hannah Arendt and U.S. Chief Justice Earl Warren during the decade preceding the era of African independence. *See supra* notes 230-234 and accompanying text. Hence, perhaps, the coupling of the right to juridical personality with human dignity seen in African Charter article 5. *See* text accompanying note 273, *supra*.

[297] Nubian Community v. Kenya, *supra* note 272, ¶ 139 (citing Case of the Yean and Bosico Children v. Dominican Republic, Judgment (050908), Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 178 (Sep. 8, 2005)). The Open Society Justice Initiative, which had submitted an amicus curiae brief to the Inter-American Court of Human Rights, summarized the case thus:

> Two girls born in the Dominican Republic to Dominican mothers applied for copies of their birth certificates. Local officials refused their request, as part of a deliberate policy to deny documents such as birth certificates to Dominicans of Haitian descent, refusing them recognition of their nationality…The Inter-American Court of Human Rights found that this was racial discrimination.

Yean and Bosico v. Dominican Republic, OPEN SOCIETY FOUNDATIONS: OPEN SOCIETY JUSTICE INITIATIVE, https://www.justiceinitiative.org/litigation/yean-and-bosico-v-dominican-republic (last visited Feb. 8, 2021).

[298] Nubian Community v. Kenya, *supra* note 272, ¶ 140.

article 5 of the Charter."[299] After over a decade of addressing such cases, particularly those involving women and children, and lobbying by African national human rights institutions and international organizations, the Commission organized a series of debates and conferences, culminating in adoption of its Resolution 234, on the Right to Nationality, in 2013.[300]

Through Resolution 234,[301] the Commission:

> Express[ed] its deep concern at the arbitrary denial or deprivation of the nationality of persons or groups of persons by African states, especially as a result of discrimination on grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;[302]

and declared itself to be:

> Convinced that it is in the general interest of the people of Africa for all African states to recognise, guarantee and facilitate the right to nationality of every person on the continent and to ensure that no one is exposed to statelessness[.][303]

It therefore:

> Call[ed] upon African states to refrain from taking discriminatory nationality measures and to repeal laws which deny or deprive persons of their nationality on ground of race, ethnic group, colour, [etc.][304]

However, in terms of an actionable right for all – men, women, and children alike – the Commission alluded to a pre-existing general right to nationality, by "recalling" UDHR article

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[299] Amnesty International v. Zambia, Communication 212/98, Afr. Comm'n Hum. Peoples' Rts., ¶58 (May 5, 1999), https://www.achpr.org/sessions/descions?id=104.
[300] *See* AFR. COMM'N HUM. PEOPLES' RTS., THE RIGHT TO NATIONALITY IN AFRICA: STUDY UNDERTAKEN BY THE SPECIAL RAPPORTEUR ON THE RIGHTS OF REFUGEES, ASYLUM SEEKERS AND INTERNALLY DISPLACED PERSONS, PURSUANT TO RES. 234 OF APRIL 2013 AND APPROVED BY THE COMMISSION AT ITS 55TH ORDINARY SESSION, MAY 2014 (2015), https://www.achpr.org/ legalinstruments/detail?id=52.
[301] Afr. Comm'm Hum. Peoples' Rts. Res. 234: Resolution on the Right to Nationality (Apr. 23, 2013), https://www.achpr.org/sessions/resolutions?id=260.
[302] *Id.*, ¶ 7.
[303] *Id.*, ¶ 9.
[304] *Id.*, ¶ 11.

15, and "noting the provisions of other human rights treaties relating to nationality, including Article 5 (d)(iii) of the [ICERD];"[305] and then:

> Reaffirm[ed] that the right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the African Charter on Human and Peoples' Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter[.][306]

The next communication to address nationality as a right, in 2015, citied the Resolution,[307] and in 2016 the Commission "confirmed this position by reaffirming" the Resolution.[308] It paraphrased (albeit within quotation marks) the relevant provision thus:

> The right to a nationality of any human person is a fundamental right derived from the terms of Article 5 of the Charter and essential for the enjoyment of other fundamental rights and freedoms guaranteed by the Charter.[309]

The facts behind this 2016 communication, Open Society Justice Initiative v. Côte d'Ivoire, are particularly salient to the cause of the Banyamulenge. The case was brought by an NGO on behalf of the Dioula people, a distinct ethnic group who had migrated from present-day Mali, south into present-day Ivory Coast, several centuries ago, but who nevertheless bear the

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[305] *Id.*, ¶ 5. The other provisions of international human rights treaties relating to the right of nationality which the Resolution notes or recalls are all specific either to women or children, except for the U.N. Convention on the Reduction of Statelessness to which the DRC is not a party: ICCPR article 24(3), articles 7 & 8 on the U.N. Convention on the Rights of the Child, articles 1-3 of the U.N. Convention on the Nationality of Married Women, and article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women (*id.*); article 6 of the African charter on the Rights and Welfare of the Child (*id.*, ¶ 2); and article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (*id.*, ¶ 3). The Resolution also "recalls" other treaties which offer protection from arbitrary denial or deprivation of nationality: the Convention Governing the Specific Aspects of Refugee Problems in Africa, the U.N. Convention Relating to the Status of Stateless Persons, and the U.N. Convention relating to the Status of Refugees and its Protocol. *Id.*, ¶ 6. None of these other treaties, however, deals with the right to nationality *per se*; moreover, the DRC is not a party to the first two.

[306] *Id.,* ¶ 10.

[307] Nubian Community v. Kenya, *supra* note 272, ¶ 140 n.52.

[308] OSJI v. Côte d'Ivoire, *supra* note 295, ¶ 97.

[309] *Id*. The Commission apparently took some liberties in the quoting of its previous instrument in order to avoid founding its holding upon the somewhat tenuous (under positive law) doctrine of implied rights (*see* VILJOEN, *supra* note 131): The rendering of "implied within" as "derives from" (*compare with* text accompanying note 306, *supra*) cannot be attributed to variances in translation between the English and French texts of the Resolution, as the French version of the Resolution reads that the right is "*implicitement inscrit dans les dispositions de l'article 5.*" Resolution 234, *supra* note 301, ¶ 10, French version, https://www.achpr.org/fr_sessions/ resolutions?id=260.

brunt of being labelled "foreign."[310] Ivorian nationality law grants Ivorian citizenship at birth to those "of Ivorian origin," without defining what constitutes "Ivorian origin."[311] Politicians exploit this ambiguity to claim that the Dioula are not "of Ivorian origin," and successive regimes have taken advantage of the vague law on nationality to pursue a discriminatory policy against the Dioula, leading to continuous civil strife and war.[312] The Commission condemned this, but recommended simply that Ivory Coast "ensure that its nationality law should be consistent with the provisions of Articles 2 and 5 of the Charter…"[313] In contrast, the DRC Constitution, unlike the Ivory Coast's nationality law, indeed does define "Congolese origin." Unfortunately, it does so on the basis of membership in an ethnic group – a distinction prohibited by article 2 of the African Charter. A definition of "origin" may be needed, but not one which perpetuates tribalism.

Therefore, in the terms of African Charter article 2, to make "any kind" of "distinction" on the basis of "ethnic group" in the "enjoyment of" the right to nationality – a right "guaranteed in the present Charter," specifically in article 5,[314] – violates the Charter.[315] As article 10 of the Constitution of the Democratic Republic of the Congo plainly distinguishes on the basis of ethnic group in the attribution of nationality by origin, it patently violates article 2 of the African Charter. It follows, therefore, that article 1 of the African Charter obliges the DRC to rectify its Constitution and laws, insofar as the DRC, in ratifying the Charter, pledged to "undertake to

[310] *See generally* Minority Rights Group International, *Côte d'Ivoire: Manding (Dioula)*, MINORITYRIGHTS.ORG, https://minorityrights.org/minorities/manding-dioula/ (last visited Feb. 6, 2021).
[311] OSJI v. Côte d'Ivoire, *supra* note 295, ¶ 54.
[312] *Id.*, ¶¶ 53-61.
[313] *Id.,* ¶ 207(ii).
[314] Both by its consecration of juridical personality (human dignity + legal status) and also via the UDHR and other international instruments, notably the ICERD and ICCPR.
[315] Afr. Charter art. 2 (tracking the article's language).

adopt legislative or other measures to give effect to" "the rights, duties and freedoms enshrined in" the Charter.[316]

B. Taking the Causes of Action to Court.

We have seen how article 10 of the Constitution of the Democratic Republic of the Congo violates three international agreements: the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights. Each instrument creates a non-judicial forum for the treaty's interpretation and resolution of disputes arising under it: the Committee on the Elimination of Racial Discrimination,[317] the Human Rights Committee,[318] and the African Commission on Human and Peoples' Rights,[319] respectively. Also, certain courts have jurisdiction to interpret these instruments and adjudicate disputes arising under them, namely: the International Court of Justice,[320] the African Court on Human and Peoples' Rights[321] and, for the issue at hand, the DRC Constitutional Court.[322]

As with any treaty, voluntary agreement among States is what creates an international judicial or non-judicial dispute resolution body, such as the five listed above. Each is available to hear cases against the DRC because the DRC has agreed to each forum's jurisdiction.

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[316] Afr. Charter art. 1.
[317] By Part II of the ICERD (arts. 8-16).
[318] By Part IV of the ICCPR (arts. 28-45).
[319] By Part II of the African Charter (arts. 30-61).
[320] Through ICERD article 22 and article 36(1) of the Court's statute, as concerning the ICERD specifically, and through articles 36(2)-(5) of the Court's statute for all three generally, subject to the parties' express submission to the Court's jurisdiction. *See infra* section III.B.6.
[321] *See* Afr. Ct. Protocol art. 3.
[322] *See* article 51, Règlement Intérieur de la Cour Constitutionnelle [Constitutional Court Procedural Rules], JOURNAL OFFICIEL DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO [J.O.] [OFFICIAL GAZETTE OF DEM. REP. CONGO], May 22, 2015, *reprinted in*, Recueil de Textes Relatifs à l'Organisation et la Compétence Judiciares [Collected Texts Relative to Judicial Organization and Jurisdiction], J.O., Oct. 20, 2016, p. 295 [hereinafter Const. Ct. Proc. R.].

However, a State's act accepting jurisdiction,[323] or even the body's constitutive instrument,[324] may limit the availability of any given forum to either individuals or to States. For complaints against the DRC, three of the fora identified above are limited to State Party claimants only. Therefore, in order to avail themselves of these latter fora, the Banyamulenge must recruit one or more State Party champions to bring suit on their behalf. The particulars for each forum are presented below.

The constitutive instrument of each forum determines the forum's subject matter jurisdiction; accordingly, each forum will determine the manner in which the DRC Constitution violates each provision of international law in that forum, be it directly or derivatively through another. Nevertheless, the prayer of relief in each forum will read along these general lines: (1) that the Commission or Court (a) find that article 10, paragraph 2, clause 2, of the DRC Constitution[325] violates international law (be it the ICERD, the ICCPR, the African Charter, or a combination thereof) insofar as it discriminates on the basis of ethnic group; and (2) that it order (to the extent of the forum's competence) the DRC to amend its Constitution and laws so as not to define "nationality by origin" with reference to ethnicity.

Moreover, political and geopolitical sensitivities will inform the choice of forum, from among the possibilities available, in which to bring the claim. To the greatest extent possible, preference should be given to individuals over States Parties as claimants. This keeps the focus on the human in this human rights claim. It also obviates, as much as possible, the spoilers' contention that a State Party claimant would use the litigation as a subterfuge to intervene in the sovereign affairs of the DRC or, worse, to advance an allegedly irredentist agenda.[326] Also, to

[323] Such as the DRC's ratification of the African Court Protocol. *See* Press Release, *supra* note 285.
[324] Such as the Charter of the United Nations for the International Court of Justice. *See infra* section III.B.6.
[325] *Supra* note 18 and accompanying text.
[326] *See supra* notes 78-81 and accompanying text.

the greatest extent possible, local and regional fora should be preferred to international so as more greatly to favor African criticism of the Congolese situation, and to encourage development of African jurisprudence on the subject. On the other hand, obtaining an authoritative determination of the core ICERD question before entering the regional fora could well outweigh these concerns, especially if taken to the CERD by a non-African State.

With these factors in mind, this author advises the following sequence of consecutive filings on behalf of the Banyamulenge. The interoperation of the fora's respective rules of procedure does not permit concurrent filings.[327] Each forum's rules determine who may bring a claim, and each forum's availability to individual claimants drives the sequence. The procedure in one forum commences upon conclusion of that in the preceding forum, when generally either (a) the decision by the preceding treaty body or court is unfavorable, or (b) the DRC does not timely amend its Constitution and nationality law as recommended or as ordered by the preceding treaty body or court:

1st Constitutional Court of the DRC
- brought by natural or legal persons, or statutory representatives,
- on the basis of the DRC Constitution and the ICERD, the ICCPR, and the African Charter;

2nd African Commission on Human and Peoples' Rights
- brought by individuals or NGOs,
- on the basis of the African Charter;

3rd U.N. Human Rights Committee
- brought by an individual,
- on the basis of the ICCPR;

[327] The ICERD, which determines jurisdiction to hear complaints arising under it in both the Committee on the Elimination of Racial Discrimination and also the International Court of Justice (*see infra* sections III.B.4 & II.B.6), is silent on the subject. However, article 5(2)(a) of the Optional Protocol to the ICCPR (which creates the right of complaint by individuals in the Human Rights Committee), *infra* note 399, prohibits the "same matter being examined under another procedure of international investigation or settlement." Rule 93(2)(j) of the African Commission Rules of Procedure, *infra* note 366, is similar. Rule 37 of the African Court's Rules of Procedure, *infra* note 462, prohibits consideration of any matter pending before the African Commission.

4th U.N. Committee on the Elimination of Racial Discrimination
- brought by a State Party,
- on the basis of the ICERD;

5th African Court on Human and Peoples' Rights
- brought by a State Party,
- on the basis of the African Charter;

6th International Court of Justice
- brought by a State Party,
- on the basis of the ICERD.

The sequence of progression from one forum to the next must remain flexible. For example, after completion of the second phase, the political and geopolitical situation may militate for bypassing one or more of the next phases. This could be, for example, if (i) the African Commission renders a favorable recommendation, (ii) the DRC balks at following it, and (iii) another African State Party is ready and willing to champion the Banyamulenge's cause against the DRC. In such a case then going straight to the African Court could make sense, bypassing the U.N. Human Rights Committee and its ICCPR-specific views (not to mention the time and expense). Likewise, if the Commission does *not* find favorably, then filing next in the CERD to obtain an ICERD-specific determination would make sense. Or, even, immediately following a negative outcome in the Constitutional Court, if a *non-African* State Party is willing, preliminary action in the CERD could be ideal.

These contingencies and others are elaborated in the discussion of each forum which follows. A flow chart illustrating the progression of the litigation from forum to forum, and the determining factors, is provided at Appendix II.

1. Constitutional Court of the DRC

The process must start at the local, Congolese level. As in any culture, solutions found by the Congolese, for the Congolese, are preferrable to solutions imposed from abroad, so as to

be more readily accepted by the Congolese, and less susceptible to accusations of foreign interference.[328] Moreover, the other five fora all require, as a prerequisite to hearing the claim, that local remedies be exhausted.[329] Furthermore, "customary international law" arguably requires exhaustion of local remedies regardless of the international forum's constitutive instrument.[330] The exhaustion of local remedies is the "most important condition"[331] precedent to an extra-national body's entertaining of a dispute pertaining to the internal affairs of a sovereign nation-state.[332] In the human rights context, the rule advances "the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy"[333] it "by its own means within the framework of its own domestic legal system."[334]

[328] Witness, for example, the proposed creation of a special criminal tribunal to adjudicate the hundreds of allegations of crimes against humanity and war crimes committed on Congolese soil during the two decades from just before the Rwandan genocide through the Congo Wars (1993-2003) (*see* Mapping Report, *supra* note 62). During the period 2011-2014, after much political wrangling and intense lobbying by international organizations, diplomatic missions, international NGOs, and other foreign technical and financial partners, the final legislation introduced in the DRC National Assembly proposed creation of special, "mixed" chambers within the Congolese judicial structure, containing "international" judges alongside Congolese. However, this then was soundly rejected by the National Assembly as entrenching the potential for undue foreign interference in Congolese judicial affairs. *See* Sara Liwerant, *Scène Juridique et Logiques Politiques de la Lutte Contre l'Impunité des Crimes Internationaux en République Démocratique du Congo [Legal Grandstanding and Political Intrigue in the Fight Against Impunity for International Crimes in the Democratic Republic of the Congo]*, 116 REVUE INTERNATIONALE ET STRATEGIQUE 107 (2019).

[329] *See* discussion of each forum, *infra*.

[330] Interhandel Case (Switzerland v. United States of America), Preliminary Objections, Judgment [Interhandel Case], 1959 I.C.J. 6, 27; Institute for Human Rights and Development in Africa [IHRDA] v. Angola, Communication 292/04, Afr. Comm'n Hum. Peoples' Rts., ¶ 38 (May 22, 2008); IHRDA v. Guinea, Communication 249/02, Afr. Comm'n Hum. Peoples' Rts., ¶ 32 (Dec. 7, 2004). *See also* ICERD art. 11(2) (requiring exhaustion of local remedies "in conformity with the generally recognized principles of international law.").

[331] Nubian Community v. Kenya, *supra* note 272, ¶ 44.

[332] *See generally* CASSESE, *supra* note 130, at 122-123.

[333] Organisation Mondiale Contre la Torture, Assoc. Internationale des Juristes Démocrates, Comm'n Internationale des Juristes, Union Africaine de Droits de l'Homme v. Rwanda, Communication 27/89, 46/91, 49/91, 99/93, Afr. Comm'n Hum. Peoples' Rts., ¶ 17 (Oct. 1996).

[334] Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia, Communication 71/92, Afr. Comm'n Hum. Peoples' Rts., ¶ 10 (Oct. 1997) (quoting Interhandel Case, 1959 I.C.J. at 27).

But, the rule applies only if local remedies are, indeed, "available" to the aggrieved individual, which are "adequate and effective,"[335] "not only in theory but also in practice."[336]

The Constitution of the DRC charges the DRC Constitutional Court (and only the Constitutional Court) with the task, when properly asked, of determining "the constitutionality of laws and acts having the force of law."[337] The Constitution also mandates that the Court, when seized of such a question, act within 30 days; or even 8 days by emergency request from the Government.[338] In so far as Constitution article 10 (on Nationality) is a law or an act having the force of law, it follows that the Constitutional Court is empowered to validate that provision's own constitutionality. In so far as duly ratified treaties have authority superior to all other provisions of DRC law, even to those appearing in the text of the Constitution,[339] it follows that any provision of the Constitution which is contrary to a duly ratified treaty is invalid, or unconstitutional. On the other hand, if the Constitutional Court were to deem either (1) the provision of the text of the Constitution to be neither a "law" nor an "act having the force of law," or (2) that an invalidity is not necessarily an unconstitutionality, then such a ruling would equate to a declaration that no local remedy is available to test the validity of DRC Constitution article 10 under (superior) international law.

As to who should bring suit, "any person" may petition the Court concerning the constitutionality of "any legislative or regulatory act," per Constitution article 162.[340] Arguably,

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[335] Mouvement Ivoirien de Droits Humains (MIDH) v. Côte d'Ivoire, Communication 246/02, Afr. Comm'n Hum. Peoples' Rts., ¶ 48 (July 29, 2008) (citing Velasquez Rodriquez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, (Jul. 29, 1988)).
[336] Nubian Community v. Kenya, *supra* note 272, ¶ 45.
[337] DRC CONST. art. 160, ¶ 1 ("La Cour constitutionnelle est chargée du contrôle de la constitutionalité des lois et des actes ayant force de loi.").
[338] DRC CONST. art. 160, ¶ 4 ("La Cour constitutionnelle statue dans le délai de trente jours. Toutefois, à la demande du Gouvernement, s'il y a urgence, ce délai est ramené à huit jours.").
[339] DRC CONST. art. 215; *see supra* note 126 and accompanying text.
[340] DRC CONST. art. 162, ¶ 2 ("Toute personne peut saisir la Cour constitutionnelle pour inconstitutionnalité de tout acte législatif ou réglementaire.").

a constitution is a "legislative act;" certainly the DRC's constitution may be amended by the legislative process alone.[341] However, the Court probably would find that the provision of the Constitution at issue here (article 10, paragraph 2, clause 2), being part of the text adopted by a nationwide referendum on February 18, 2006,[342] is not a "legislative act."[343] If so, then not just "any person" may petition the Court to interpret a provision of the Constitution. Rather, per article 161, only the President, the Prime Minister, the Presidents of either the Senate or the National Assembly, a tenth of the members of either parliamentary chamber, the Governors of the Provinces, and the Presidents of the Provincial Assemblies may do so.[344] However, article 216 excludes Provincial Governors and the Presidents of Provincial Assemblies from this category when the question involves constitutional interpretation of a treaty or international accord,[345] though arguably only in pre-ratification constitutionality reviews.[346]

In order thoroughly to exhaust the local remedy, as well as to maximize political awareness of the offending constitutional provision, all possibilities of party plaintiff should be employed: private persons, both natural and legal, national officials, and provincial officials. The Banyamulenge community should designate one or more (a) emblematic private individuals,

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[341] *See* DRC CONST. art. 218 (a national referendum may be bypassed if the proposed constitutional amendment is approved by a three-fifths majority of the Senate and National Assembly combined).
[342] DRC CONST. art. 229.
[343] *See* definition of "*acte législatif*" (as the term appears in the original):

> Au sens formel, tout acte, quel que soit le caractère individuel ou général de son contenu, adopté par le Parlement selon la procédure législative et promulgué par le président de la République. [In the formal sense, any act, whatever may be the individual or general character of its content, adopted by the Parliament according to legislative procedure and promulgated by the President of the Republic.]

GÉRARD CORNU, VOCABULAIRE JURIDIQUE 22 (9th ed. 2011) (author's translation).
[344] DRC CONST. art. 161, ¶ 1; Const. Ct. Proc. R. art. 51.
[345] DRC CONST. art. 216; Const. Ct. Proc. R. art. 38.
[346] This provision contemplates review for constitutionality of a proposed treaty during the period of deliberation on whether to ratify the treaty, part of the national government's foreign-relations power. Here, however, the provision would be invoked post-ratification, to assess the Constitution's validity within the terms of an international accord to which the DRC already has submitted; thus, it would not pose any potential for provincial usurpation of the national government's foreign-relations power. Indeed, it is a request for review of existing domestic Congolese law according to the monist principle governing the Congolese legal system (*see supra* notes 134-136 and accompanying text).

and (b) relevant NGOs, to represent the communal interest as parties plaintiff, per Constitution article 162;[347] and also request (c) the President, the Prime Minister and the Presidents of both parliamentary chambers, per articles 161 & 216,[348] as well as (d) the Governor of South Kivu Province and the President of the South Kivu Provincial Assembly, per article 161,[349] to serve as statutory representative parties plaintiff. The best-case scenario would see on the case caption, listed as Petitioners, at least one from each of these four categories.

Fortunately, article 27 of the Constitution provides a civil right to "every Congolese" citizen to petition "the public authority," who is to respond within three months.[350] This provides a ready mechanism by which to document genuine, good faith efforts at recruiting a required statutory representative for purposes of proving, in a subsequent international forum, having exhausted the availability of the sole remedy under Congolese law – should the potential statutory representatives either decline the request, respond ambivalently, or not respond within 3 months. The same person(s) designated to be plaintiff(s) should make these petitions. However, as this right of petition is limited to citizens, only natural persons can exercise it; hence an additional reason to insist on at least one natural person plaintiff. Moreover, the private individual(s) designated as plaintiff(s) should possess unassailable credentials of Congolese citizenship, and copies of these credentials be attached to each petition. By the same logic, any NGO must be duly incorporated under Congolese law and in full compliance with all Congolese regulatory requirements,[351] and documentation of these credentials made exhibits to the Petition to the Constitutional Court.

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[347] *Supra* note 340.
[348] *Supra* notes 344 & 134.
[349] *Supra* note 344.
[350] DRC CONST. art. 27.
[351] *See* Loi n° 004/2001 du 20 Juillet 2001 Portant Dispositions Générales Applicable aux Associations Sans But Lucratif et aux Etablissements d'Utilité Publique [Law No. 004/2001 of July 20, 2001 on General Dispositions Applicable to Non-Profit Organizations and Public Service Establishments], http://www.leganet.cd/Legislation/

This way, these persons can, with confidence, plead in a later international forum that they thoroughly exhausted all avenues of local, Congolese remedy. None of the designated officials may prove willing to serve as statutory representative or, if a Provincial official agrees, the Court may hold that he or she lacks standing under article 216.[352] The Court may further hold that the private individual and NGO plaintiffs lack standing, because either they are not included in the article 161 or 216 categories of permissible plaintiffs,[353] or the Court may not agree that article 162 encompasses the Constitution as a "legislative or regulatory act."[354]

Should no authorized statutory representative answer the call, and even if it is highly likely that the Court would dismiss the case *in limine* for lack of standing by the private individual and NGO plaintiffs, the plaintiffs nevertheless should not view their Complaint in the Constitutional Court as merely *pro-forma.* They should plead all causes of action with sufficient thoroughness so as to give notice of all allegations they intend to present in any subsequent international forum. This will fulfill the principle underlying the rule of exhaustion of local remedies.[355] Moreover, as their theory of standing, though tenuous,[356] is not frivolous, the Court just might take the case. Therefore, the Banyamulenge community must engage members of the Congolese Bar adept in Congolese pleading and practice to draft the Petition to the Constitutional Court in full and due form, and then prosecute it to conclusion. With full

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Droit%20Public/loi0042001 .20.07.2001.asbl.htm; *see generally* Lionel Kabeya, *Création d'une Association sans but Lucratif en RDC [Creation of a Non-Profit Organization in DRC]*, ANALYSES & OPINIONS: LEGANEWS.CD (Feb. 19, 2020), https://www.leganews.cd/index.php/analyses-et-opinions/1835-creation-d-une-association-sans-but-lucratif-en-rdc-5-etapes-a-suivre (a minimum five-step process, involving 3 different government offices).

[352] *See supra* note 345 and accompanying text.

[353] *See supra* notes 344 & 345 and accompanying text.

[354] *See supra* note 343 and accompanying text. These persons ostensibly would have solid standing under article 162 to challenge the constitutionality of the 2004 legislation (*see* text accompanying note 340, *supra*), and perhaps that could be a clever way to shoehorn their way to the merits: by arguing that the legislation is unconstitutional because it is based upon a provision on the Constitution which itself it unconstitutional because it violates international law.

[355] *Supra* note 333 and accompanying text.

[356] *See supra* notes 341-343 and accompanying text.

deference to Congolese legal expertise, suggested allegations essential to each cause of action appear as Appendix III. (The reader is invited to review these allegations now, as much of which follows builds upon them.)

Furthermore, although it is not within the purview of the judiciary to prescribe specific legislative content, it would be a lost opportunity not to commend to the Court the work of the African Commission regarding the right to nationality in Africa.[357] "Stressing the need to take new decisive steps towards…protecting the right to nationality,"[358] the Commission has advanced a Draft Protocol on the Right to a Nationality and the Eradication of Statelessness.[359] Inspired by this Draft Protocol, the Court (should it find for the plaintiffs) might suggest that the legislature amend article 10, paragraph 2, clause 2 of the DRC Constitution, and the corresponding provision of the nationality law, to read: "Congolese by origin is any person born in the territory of the DRC of a parent also born there."[360] As the Draft Protocol makes crystal clear, nationality by birth "shall not be understood as a reference to ethnic or racial origin."[361]

2. The African Commission on Human and Peoples' Rights

Having either not prevailed in the Constitutional Court or, after having prevailed, the DRC government delays initiating the constitutional amendment process, the plaintiffs may then present their claim to the African Commission. Although it may seem more logical to "appeal" a judgment to a judicial forum, the African *Court* on Human and Peoples' Rights is not currently

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[357] *See* AFR. COMM'N HUM. PEOPLES' RTS., THE RIGHT TO NATIONALITY IN AFRICA, *supra* note 300.
[358] Resolution on the Drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa, Afr. Comm'n Hum. Peoples' Rts. Res. 277 (May 12, 2014), sixth unnumbered paragraph, https://www.achpr.org/sessions/resolutions?id=324.
[359] Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa [Draft Protocol on Nationality], May 2017, https://www.achpr.org/presspublic/publication?id=25.
[360] *See id.,* art. 5(1)(b) ("A State Party shall attribute nationality by operation of law from the moment of birth to…A child born in the territory of the State of one parent also born there.").
[361] *Id.,* art. 1, fourteenth unnumbered paragraph (definition of "nationality").

available to individual Congolese plaintiffs. The DRC, like the majority of African States which have accepted the Court's jurisdiction over disputes between States,[362] has not made the required declaration under article 34(6) of the Protocol establishing the African Court on Human and Peoples' Rights[363] so as also to accept the Court's jurisdiction over claims brought by individuals.

Article 55 of the African Charter grants individuals and NGOs the ability to complain to the Commission about a State Party's non-compliance with the Charter or, as it is said in African Commission parlance, to "communicate" with the Commission.[364] Shortly after adoption of the Charter in June 1981, the Commission promulgated two "Information Sheets" for individuals on how to file communications.[365] Rules of Procedure followed in 1988, which were first revised in 1995, then in 2010, and again just recently in March 2020.[366] The rules clarify that "any natural or legal person" may submit a communication under article 55,[367] and may act either *pro se* or through representation.[368] The rules also provide for amicus curiae[369] and third party

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[362] *See* List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, AFRICAN UNION, Jan 16, 2017, https://www.african-court.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-May-2020.pdf (needs updating as of last visit on Apr. 5, 2021).
[363] *See supra* note 285.
[364] The Charter does so implicitly, by directing the Commission's Secretary to take certain action on "communications other than those of States parties." Afr. Charter art. 55.
[365] Org. Afr. Unity, Afr. Comm'n on Hum. and Peoples' Rights, *Info. Sheet No. 2, Guidelines for the Submission of Communications* (undated) https://www.achpr.org/ guidelinesforsubmittingcomplaints (last visited Dec. 9, 2020); Org. Afr. Unity, Afr. Comm'n on Hum. and Peoples' Rights, *Info. Sheet No. 3, Commc'n Proc.* (undated), https://www.achpr.org/ communicationsprocedure (last visited Oct. 19, 2020).
[366] Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020 (Mar. 4, 2020) https://www.achpr.org/rulesofprocedure, p. 1 [hereinafter Afr. Comm'n R. Proc.].
[367] Afr. Comm'n R. Proc. 115(1). There is no registration requirement for NGOs to appear in communications before the Commission, other than being duly incorporated in their home State. This is not to be confused with the Commission's registration requirements for NGOs desiring permanent observer status with the Commission. *See* Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations Working on Human and Peoples' Rights in Africa, Afr. Comm'n Hum. Peoples' Rights, Res. 361 (Nov. 4, 2016), https://www.achpr.org/sessions/resolutions?id=373.
[368] Afr. Comm'n R. Proc. 91. The Rule speaks of "one or more representatives," and the rules do not indicate whether such representatives must be licensed attorneys; the rules only allude to the legal profession when providing that "the Commission may facilitate access to free legal representation." Afr. Comm'n R. Proc. 126(1).
[369] Afr. Comm'n R. Proc. 104 & 105.

intervention[370] in communications, as well as the appearance of witnesses, both factual and experts, at hearings.[371] The overall process consists of three phases: seizure (acceptance of the initial filing(s) and opening of a case), admissibility (preliminary determination whether the communication meets all criteria required in order to be heard), and the merits. Beyond the initial filing(s) during the seizure phase, there is the opportunity to submit briefs at the admissibility phase and, by leave of the Commission, also at the merits phase.[372] On the request of a party or the Commission, hearings may be held at either the admissibility or merits phases, or both.[373] Objections may be raised by any party during any phase, with opportunity to respond, within certain time limits.[374] In short, a robust and complicated procedure for the prosecution of communications has evolved;[375] hence, claimants should engage legal counsel versed in practice before the Commission.

The Charter, Rules and Information Sheets prescribe no particular format for communications, but do require for seizure that the initial filing contain certain minimum information regarding the complainant's identity, the alleged violation of the Charter, the exhaustion of local remedies, that disparaging or insulting language not be used and that the complaint not be based solely upon media reports.[376] Communications should be addressed, and sent by any means, to the Chair via the Secretary of the Commission in Banjul, the Gambia.[377]

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[370] Afr. Comm'n R. Proc. 106.
[371] Afr. Comm'n R. Proc. 103.
[372] Afr. Comm'n R. Proc. 115-126.
[373] Afr. Comm'n R. Proc. 102.
[374] Afr. Comm'n R. Proc. 117.
[375] *See generally* VILJOEN, *supra* note 131, at 300-348.
[376] *See* Afr. Charter art. 56; Afr. Comm'n R. Proc. 115. The Secretary (akin to a clerk of court) is directed to work with claimants and to request additional information from them, in order to open the case and not simply reject an initial filing if incomplete; in other words, "to seize the Commission of the Communication." Afr. Comm'n R. Proc. 115(4).
[377] Afr. Comm'n R. Proc. 115(1). Per the Commission's website, the mailing address is: 31 Bijilo Annex Layout, Kombo North District; Western Region P.O. Box 673 Banjul; The Gambia. Email addresses are: au-banjul@africa-union.org and africancommission@yahoo.com. Telephone numbers are: (220) 441 05 05, 441 05 06, and Fax: (220) 441 05 04. *See* https://www.achpr.org (last visited Feb. 21, 2021).

Unfortunately, the Charter does not, unlike the African *Court's* Protocol,[378] grant the Commission subject-matter jurisdiction to find violations of human rights instruments other than of the Charter.[379] However, as discussed previously, to determine if a right is guaranteed by the Charter and, if so, the norms applicable to its guarantee, the Charter directs the Commission to look both to other human rights instruments ratified by the parties,[380] and also to principles of law accepted by the parties.[381] Therefore, with full deference to the expertise of regular practitioners before the African Commission, here follows a suggested description of the Charter's violation by the DRC Constitution and nationality law, for use in the African Commission:[382]

> A. Whereas the DRC ratified the African Charter on July 28, 1987;[383]
>
> B. Whereas the African Charter guarantees to everyone the right to nationality, through:
>
> (i) Article 5 of the Charter, as held by the African Court on Human and Peoples' Rights,[384]
>
> (ii) Article 15 of the Universal Declaration of Human Rights, via article 60 of the Charter,[385] and
>
> (iii) Article 16 of the International Covenant on Civil and Political Rights (to which the DRC acceded on November 1, 1976),[386] via article 60 of the Charter; and
>
> C. Whereas the African Charter obliges the DRC, through article 1 of the Charter, to undertake to adopt legislative or other

[378] *See infra* Section III B 5.
[379] *See* Afr. Ct. Protocol art. 3.
[380] Afr. Charter art. 60; *see supra* note 279 and accompanying text.
[381] *Id.*, art. 61; *see supra* note 280 and accompanying text.
[382] *Compare with* suggested allegations in the Constitutional Court, at Appendix III, *infra*.
[383] Afr. Charter, Table of Ratification and Adherence, *supra* note 270.
[384] Penessis v. Tanzania, ¶ 89 (text accompanying note 292, s*upra*).
[385] *Id.* ¶ 168(v) (text accompanying note 293, *supra*).
[386] *See* Hum. Rts. Comm., Views, Borzov v. Estonia, ¶ 4.6, and Šipin v. Estonia, ¶ 6.2; Gen. Comments 18 (Non-Discrimination), ¶¶ 6 & 12, and 31 (General Legal Obligation), ¶¶ 13, 14 & 19 (notes 238-256 and accompanying text, *supra*).

measures to give effect to that right,[387] and in so doing not to make any kind of distinction on the basis of ethnic group, per:

(i) Article 2 of the Charter,[388]

(ii) Articles 1(1) and 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (to which the DRC acceded on April 21, 1976),[389] applied via article 60 of the Charter,

(iii) Article 26 of the International Covenant on Civil and Political Rights,[390] applied via article 60 of the Charter, and

(iv) The *jus cogens* peremptory norm prohibiting racial and ethnic group discrimination, explicitly acknowledged by the DRC,[391] applied via article 61 of the Charter; and

D. Whereas article 10, paragraph 2, clause 2, of the DRC Constitution, adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004 relative to Congolese Nationality, define Congolese "nationality by origin" in terms of and with reference to ethnic group, or create a preference based on ethnic group in the attribution of nationality under Congolese law; and

E. Whereas article 10, paragraph 2, clause 2, of the DRC Constitution, and article 6 of Law No. 04/024 of November 12, 2004 relative to Congolese Nationality, distinguish on the basis of ethnic group in its giving effect to the right of nationality, and thereby violate article 2 of the African Charter;

F. Therefore, per article 1 of the African Charter, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the Constitution, and article 6 of Law No. 04/024 of November 12, 2004 relative to Congolese Nationality, so as not to define "nationality by origin" on the basis of or with reference to ethnic group.

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[387] Afr. Charter art. 1 (note 316 and accompanying text, *supra*).
[388] Afr. Charter art. 2 & ninth preambular paragraph (notes 274-276, 315 and accompanying text, *supra*).
[389] ICERD arts. 1(1) & 5(d)(iii) (text accompanying notes 144 & 156, *supra*).
[390] *See* Hum. Rts. Comm., Gen. Comment 18 (Non-Discrimination), ¶ 12 (note 243 and accompanying text, *supra*).
[391] *See* notes 147-154 and accompanying text, *supra*.

Of course, the communication must fully describe the claimants' efforts in petitioning the DRC Constitutional Court, and the outcome of those proceedings. It also should describe the factual background of the violation in order to provide the African Commission with context, by describing the history of political manipulation of the Banyamulenge's Congolese citizenship, the wars it has engendered, and the violence it continues to spawn which threatens the security of the Continent.[392] It should also invoke the Commission's extensive work to-date on the right to nationality,[393] and demonstrate how the communication – a request for a formal finding and recommendation on a specific provision of an African State's constitution and law – is in direct furtherance of that work.

However, the formal petitioning aspect of the communication – i.e., the allegation on which the Commission is asked to make findings and recommendations – should focus on and limit itself to the illegal language of the 2006 Constitution and 2004 law on nationality, only. The potential additional violations of the Charter arising from the withdrawal of Minembwe's short-lived Rural Commune status in 2020[394] certainly form part of the factual context of the complaint. Nevertheless, plaintiffs should not plead them as such, not even implicitly. The facts should be described in such a way so as not to allege further violations of the Charter for which the plaintiffs request Commission action: that is, the making of findings and recommendations. This would detract from the lynchpin issue of removing ethnicity from the attribution of

[392] *See supra* notes 14-17, 72-80, and accompanying text.
[393] *See* AFR. COMM'N HUM. PEOPLES' RTS., THE RIGHT TO NATIONALITY IN AFRICA, *supra* note 300; Draft Protocol on Nationality, *supra* note 358.
[394] *Supra* notes 74-80 and accompanying text. Besides violating the right to nationality by perpetuating conditions of *de facto* statelessness, the withdrawal of the municipal organization also arguably violated the Banyamulenge's right to self-determination under African Charter article 20 and ICCPR article 1; specifically, what has come to be called the right to internal self-determination. *See* Alan Patten, *Self-Determination for National Minorities, in* THE THEORY OF SELF-DETERMINATION 120 (Fernando R. Tesón ed., 2016); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 348-359 (1995). Analysis of this potential violation, however, is beyond the scope of this thesis.

nationality, and risk opening the process to spoilers and opponents.[395] Worse, it also would risk rendering the communication inadmissible, for failure to exhaust local remedies[396] or otherwise.[397] For these reasons, the fullest elaboration of the facts should be deferred until the merits phase of the case, or made not by the parties plaintiff but by an amicus curiae.

3. The U.N. Human Rights Committee

Whatever the result in the African Commission, if no State Party steps up at this point to champion the Banyamulenge's cause, the only forum remaining to them would be the United Nations Human Rights Committee; and all that the Committee may render is its views on the claim as seen through the lens of the International Covenant on Civil and Political Rights. Granted, it would be ideal if the Banyamulenge instead could petition the Committee on the Elimination of Racial Discrimination and obtain its views under the International Convention on the Elimination of All Forms of Racial Discrimination – the key international instrument central to the overall claim. Unfortunately, however, that forum is not available to individual claimants

[395] *See, e.g.,* Press Release, Afr. Comm'n on Hum. and Peoples' Rts., Communiqué de Presse Relatif à l'Adoption du Projet de Loi Visant la Protection des Populations Autochtones par l'Assemblée Nationale de la RDC [Press Release on the Introduction of a Bill in the DRC National Assembly Regarding the Protection of Autochthonous Populations] (June 29, 2020) (praising introduction in the DRC national assembly of legislation concerning indigenous populations, whereas said legislation would not equally protect so-called non-indigenous ethnic minorities); *see also* Joint Press Release, Afr. Comm'n on Hum. and Peoples' Rts., Communique de Presse Conjoint sur les Allegations de Massacre de Deux-Cent Vingt Civils par la Coalition Ngumino et Twigwaheno dans le Village de Kipupu, du Secteur d'Itombwe dans le Territoire de Mwenga dans la Province du Sud-Kivu, a l'est de la Republique Democratique du Congo [Joint Press Release on the Allegations of 220 Civilians Massacred by the Ngumino and Twigwaheno Coalition in the Village of Kipupu… in Eastern DRC] (July 27, 2020) (one of its authors is the Commission's current Rapporteur for the DRC, and it grossly exaggerates the verified death toll (11) of subject incident, blaming the Banyamulenge self-defense militias without any explanation; moreover, no similar press releases have been issued condemning the many Mai Mai militia attacks targeting Banyamulenge communities in and around Minembwe).

[396] Although an adequate and effective Congolese juridical remedy may not be reasonably available for this question (*see* notes 335 & 336, *supra*), the time and effort to litigate the question would unduly detract from the true issue at hand.

[397] *See* Qatar v. United Arab Emirates, Judgment, 2021 I.C.J. __, ¶ 61 ("some latitude to develop the allegations in [an] application" is allowed "so long as it does not 'transform the dispute…into another dispute which is different in character.'" (quoting Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, 1998 I.C.J. 275, 318-319, ¶¶ 98 & 99 (June 11))).

against the DRC.[398] Nevertheless, the Banyamulenge would not be wasting their resources by proceeding in the Human Rights Committee under the ICCPR: doing so would elevate their claim to the level of the United Nations, demonstrate to the International Community their determination and, hopefully, thereby garner enough international support to recruit one or more State Party champions to take the litigation further.

Part IV of the Covenant establishes the Human Rights Committee.[399] Its Optional Protocol gives individual claimants the ability to file complaints.[400] The DRC acceded to the Optional Protocol at the same time as it did to the Covenant, on November 1, 1976.[401] A robust practice has evolved throughout the four decades since the Committee's entry into force in 1979.[402] The Committee adopted Rules of Procedure at its first session, which since have been amended 17 times, most recently in 2019.[403] Filing requirements, the rhythm of response and replies, and availability of oral argument, are similar to those in the African Commission.[404] However, the Optional Protocol permits only individual natural persons to appear as parties petitioner before the Human Rights Committee.[405] Nevertheless, NGOs are permitted and

[398] Article 14 the Convention requires a special Declaration, in addition to ratification, by a State Party in order to accept the CERD's jurisdiction to hear complaints from individuals and not just other States Parties (ICERD art. 14), and the DRC has not made such a Declaration (ICERD Table, *supra* note 142).
[399] ICCPR arts. 28 - 45.
[400] Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR Optional Protocol]. Though adopted by the U.N. General Assembly concurrently with the Covenant itself (*see supra* note 140), the ICCPR Optional Protocol often is referred to as the "First Optional Protocol," due to there being another Optional Protocol which was adopted by the General Assembly in 1989. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414. This thesis uses the former appellation.
[401] Rep. of the Hum. Rts. Comm., at 111-115, annex I, U.N. Doc A/42/40 (1987).
[402] On March 28, 1979, in accordance with paragraph 2 of ICCPR article 41. ICCPR Table, *supra* note 218.
[403] Human Rights Committee, *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev. 12 (Jan. 4, 2021) [hereinafter HRC R. Proc.].
[404] *Compare with* Afr. Comm'n R. Proc., *supra* note 366.
[405] ICCPR Optional Protocol art. 1. *See also* Human Rights Committee, *Guidelines on Making Oral Comments Concerning Communications,* U.N. Doc. CCPR/C/159/Rev. 1 (Mar. 26, 2019).

encouraged to assist individual claimants,[406] they may submit briefs as amicus curiae under certain conditions,[407] and may observe sessions of the Committee upon accreditation.[408]

No particular format exists for communications to the Committee, as long as the filing contains the minimum information required by Optional Protocol article 5,[409] and expanded upon in Committee Rule of Procedure 90.[410] To this end, the U.N. Office of the High Commissioner for Human Rights[411] has created a Model Complaint Form which is available online.[412] Individual complaints must be filed, in writing, with the Secretariat of the Human Rights

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[406] Human Rights Committee, *The Relationship of the Human Rights Committee with Non-Governmental Organizations*, at 3, U.N. Doc. CCPR/C/104/3 (June 4, 2021).

[407] HRC R. Proc. 96; Human Rights Committee, *Guidelines on Third-Party Submissions*, https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx (last visited Feb. 24, 2021).

[408] Human Rights Committee, *Information Note on Accreditation to Attend Session of Treaty Bodies*, https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Accreditation.aspx (last visited Feb. 24, 2021).

[409] Article 5(2) of the Optional Protocol reads as follows:

> The Committee shall not consider any communication from an individual unless it has ascertained that:
>
> (a) the same matter is not being examined under another procedure of international investigation or settlement;
>
> (b) the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

ICCPR Optional Protocol art. 5(2).

[410] Rule of Procedure 90(1) reads as follows:

> The Secretary-General may request clarification or additional information from the author of a communication, including:
>
> (a) The name, address, date of birth and occupation of the author and the verification of the author's identity;
>
> (b) The name of the State Party against which the communication is directed;
>
> (c) The object of the communication;
>
> (d) The provision or provisions of the Covenant alleged to have been violated;
>
> (e) The facts of the claim and evidence to substantiate them;
>
> (f) Steps taken by the author to exhaust domestic remedies;
>
> (g) The extent to which the same matter is being or has been examined under another procedure of international investigation or settlement.

HRC R. Proc. 90(1). Important to note is that the Rule describes these elements as being within the discretion of the Secretary-General to request, on a case-by-case basis; and that the Committee, not the Protocol, prescribed the Rule. The last data point solicited might suggest that *prior* examination under another international procedure would preclude examination by the Committee, but the Protocol prohibits only *concurrent* examinations by other mechanisms. *See* ICCPR Optional Protocol art. 5(2)(a).

[411] Which provides administrative support to all the U.N. Human Rights Treaty Bodies. *See Monitoring the Core International Human Rights Treaties,* U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx (last visited Feb. 27, 2021).

[412] At https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx (last visited Feb. 24, 2021) (form is accessed via embedded link on page).

Committee in Geneva.[413] As with the African Commission, parties are not required to be represented by legal counsel in the Human Rights Committee. However, and also as with the African Commission,[414] a robust and complicated procedure for the prosecution of communications has evolved over the past 40-plus years, and the Banyamulenge should engage legal counsel well versed in practice before the U.N. Treaty Bodies.

That said, based upon the foundational pleadings in the DRC Constitutional Court (Appendix III), and with complete deference to counsel, here follows a suggested description of how the DRC Constitution and nationality law violate the ICCPR, both the Right to Nationality under ICCPR articles 16 and 26,[415] and the Right to Life under article 6(1)[416] of the Covenant:[417]

A
(Right to Nationality)

> Whereas the DRC acceded to the ICCPR and its Optional Protocol on November 1, 1976; and
>
> Whereas articles 16 and 26 of the ICCPR oblige the DRC to guarantee the right to nationality to all persons within its jurisdiction without any discrimination on the basis of ethnic origin;[418] and
>
> Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004, each defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law; and

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[413] At the following address: Petitions Team / CCPR - HRTD / Office of the High Commissioner for Human Rights / Palais Wilson - 52, rue des Pâquis / CH-1211 Geneva 10 (Switzerland) / Fax: + 41 22 917 9022 / E-mail: petitions@ohchr.org. *See Human Rights Committee, Secretariat Contact Details*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/EN/ HRBodies/CCPR/Pages/Contact.aspx (last visited Feb. 27, 2021).
[414] Apparently, the drafters of the African Charter took much inspiration from practice which had developed in the Human Rights Committee and the CERD when crafting the procedure for communications in the African Commission. *See* VILJOEN, *supra* note 131, at 300-302.
[415] *See supra* section III.A.2.b.i – Right to Nationality under the ICCPR.
[416] *See supra* section III.A.2.b.ii – Right to Life under the ICCPR.
[417] *Compare with* suggested allegations in the Constitutional Court, at Appendix III, *infra*.
[418] ICCPR arts. 16 & 26, and Hum. Rts. Comm. jurisprudence, *supra* section III.A.2.b.i.

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004, in so far as each distinguishes on the basis of ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, violate ICCPR articles 16 and 26 by discriminating on the basis of ethnic origin;

Therefore, per article 2(2) of the ICCPR, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004, so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

B
(Right to Life)

Whereas the DRC acceded to the ICCPR and its Optional Protocol on November 1, 1976; and

Whereas article 6(1) of the ICCPR obliges the DRC to guarantee the right to life to all persons, which right includes the right to enjoy a life with dignity, and that security in one's nationality is a basic element of human dignity;[419] and

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004, each defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law; and

Whereas the history of the Congo since independence is replete with instances of the State, or persons purporting either to represent or to influence the State, having either denied, withdrawn or called into question the Congolese nationality of persons and peoples, notably the Banyamulenge, on the basis of their membership *vel non* in an ethnic group;[420] and

Whereas, as long as "nationality by origin" is defined in terms of or with refence to ethnic origin, members of ethnic groups which, due to their ethnic origin, have been denied or have had their Congolese nationality withdrawn or called into question, cannot feel secure in their nationality; and

[419] ICCPR art. 6(1), and Hum. Rts. Comm. jurisprudence, *supra* section III.A.2.b.ii.
[420] *See* discussion *supra* section II.

> Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004, in so far as each defines "nationality by origin" with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, undermine the dignity of those persons and peoples who, due to their respective ethnic origins, have in the past been denied or have had their Congolese nationality withdrawn or called into question, and thus violate ICCPR article 6(1);
>
> Therefore, per article 2(2) of the ICCPR, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the Constitution adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004, so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

4. The U.N. Committee on the Elimination of Racial Discrimination

As mentioned above, if the Banyamulenge do not prevail in the African Commission but a State Party *is* at that point ready, willing and able to champion the cause of the Banyamulenge against the DRC, then certainly they should proceed next in the Committee on the Elimination of Racial Discrimination, and forgo the Human Rights Committee's views under the ICCPR (not to mention the time and expense involved).[421]

Obtaining the views of the CERD would serve two purposes which, in this author's opinion, justify the risk of appearing paternalistic by "appealing"[422] the decision of the African Commission to an international forum, and not directly to the African Court. First, coming to court armed with an "authoritative interpretation of the Convention" from the primary body endowed with "the right to give" such interpretation[423] should be of great weight – particularly if

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[421] *See* Litigation Flow Chart at Appendix II, *infra*.

[422] The term "appeal" is used colloquially here and throughout this thesis.

[423] U.N. GAOR, 40th Sess., 3d Comm., 46th mtg. at 8, U.N. Doc. A/C.3/40/SR.6 (Nov. 19, 1985). In answer to the question whether "it was the responsibility of the General Assembly, the States Parties or the Committee…to interpret the provisions of the Convention," the U.N. Office of Legal Affairs Representative stated:

> The right to give authoritative interpretations of the Convention… rest[s]… in the first instance, with CERD itself, as the body responsible for monitoring and compliance with the Convention, and ultimately with the States Parties.

asking the African Court to override the views of the African Commission. Second, exercise of the ICERD's own built-in State v. State dispute resolution mechanism will fulfill a later exhaustion of remedies requirement in the International Court of Justice,[424] should the litigation go that far. Moreover, if a State Party champion is ready and willing even so early as at the conclusion of the proceedings in the DRC Constitutional Court, then the Banyamulenge should seriously consider obtaining the ICERD-specific views of the CERD then, in order to have that "authoritative interpretation"[425] in their quiver before proceeding regionally. In fact, the Convention itself seems to contemplate interlocutory use of the CERD for such declarations of right,[426] under article 16 of the Convention.[427]

Furthermore, in a U.N. Treaty Body such as the CERD, the State Party champion does not necessarily need to be an *African* State. Hence, if a non-African State Party is willing,[428] this

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Id. (question and answer made during General Assembly deliberation over the terms of a revised draft resolution concerning a report which the CERD had submitted to the General Assembly discussing its review of ICERD Periodic Reports received from several States Parties).

[424] *See infra* section III.B.6.

[425] *Supra* note 422.

[426] To borrow a concept from civil litigation. *See, cf.,* UNIFORM DECLARATORY JUDGMENTS ACT § 1 (UNIF. L. COMM'N 1922), which reads, for example (as adopted by Virginia):

> In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment, order or decree merely declaratory of right is prayed for.

VA. CODE ANN. § 8.01-184 (1950), https://law.lis.virginia.gov/vacode/8.01-184/ (last visited Apr. 5, 2021).

[427] Article 16 of the Convention reads as follows:

> The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

ICERD art. 16.

[428] Although the prohibition of racial discrimination is *jus cogens*, and its elimination a concern *erga omnes* (*see supra* notes 146-150 and accompanying text), it would make sense that such a State Party have an additional interest, such as a significant Banyamulenge diaspora living within its jurisdiction, or being a major donor of foreign assistance to the DRC, or both.

would avoid, for now, the heightening of regional tensions which the filing of a claim by an African State against the DRC necessarily would entail.

Whatever forum may have preceded their trip to the CERD, the Banyamulenge will be charting new international procedural ground once there: in its over half-century of existence, no State Party has yet referred a complaint against another State Party to the CERD for resolution under the non-judicial procedure created by the Convention.[429] Consequently, the Committee has not altered its Rules of Procedure with regard to practice under the inter-State complaint mechanism since its second session in 1970.[430] The Convention[431] and the Committee's Rules of Procedure[432] describe a process of document exchange without hearings, nor separate procedural phases on admissibility[433] and merits, and tilted heavily in favor of settlement by negotiation under the good offices of the Committee.

According to the Rules of Procedure, after receipt of the initial complaint, the CERD would send it to the respondent State Party for response, and then the response to the complainant State Party for reply.[434] Thereafter will follow a cooling-off period, during which the parties are encouraged to "adjust" the matter through "bilateral negotiations or by any other procedure" available.[435] After at least six months have elapsed, and only if one of the parties "refer[s] the matter again to the Committee,"[436] the CERD may then request as much further

[429] THORNBERRY, *supra* note 171, at 55. Although States have brought cases arising under the ICERD to the International Court of Justice, per article 22 of the Convention. *See infra* section III.B.6.
[430] LERNER, *supra* note 147, at 107.
[431] ICERD arts. 11-13.
[432] Committee on the Elimination of Racial Discrimination, *Rules of Procedure of the Committee on the Elimination of Racial Discrimination*, arts. 69-79, U.N. Doc. CERD/C/35/Rev. 3 (1986) [hereinafter CERD R. Proc.].
[433] Although paragraph 3 of Rule 69 apparently gives the Committee the power to freeze the procedure at the intake phase, by voting not to forward the initial complaint to the respondent State Party for response. CERD R. Proc. 69.
[434] CERD R. Proc. 69.
[435] ICERD art. 11(2).
[436] *Id*.

information from the parties as it deems necessary.[437] Thereafter, the Committee shall convene an "*ad hoc* Conciliation Commission"[438] to which it will give the file it has compiled. This *ad hoc* Commission then "considers" the file and writes a report to the Committee, including findings on all relevant questions of fact, and recommendations "as it may think proper."[439] The disputant States then may declare, within three months, "whether or not they accept the recommendations," after which the CERD will circulate the report, plus the disputants' declarations, to all States Parties to the Convention.[440]

The only other way in which a State Party could conceivably prompt the CERD to render an advisory opinion regarding another State Party's compliance with the Convention, would be in reaction to that other State Party's Periodic Report to the Committee.[441] There have been attempts at such "disguised interstate disputes,"[442] yet the Committee has admonished "that article 11 'is the only procedural means available' to States for drawing" the Committee's attention to the situations of other States which they consider violate the Convention.[443] Perhaps a reason for trying to skirt the procedure is its essential element of "invocation and exhaustion" of "all available domestic remedies,"[444] a "well-established rule of Customary International Law."[445]

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[437] CERD R. Proc. 70.
[438] ICERD art. 13(1).
[439] ICERD art. 13(2).
[440] ICERD art. 13(3).
[441] ICERD art. 9.
[442] THORNBERRY, *supra* note 171, at 55 (quoting MICHAEL BANTON, INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION 108 (1996)).
[443] THORNBERRY, *supra* note 171, at 55-56 (quoting Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 16 (Concerning the Application of Article 9 of the Convention), U.N. Doc. A/48/18 (Sep. 15, 1993)).
[444] ICERD art. 11(3).
[445] Interhandel Case, 1959 I.C.J. at 27. That the Convention, adopted in 1965, should codify the rule under its inter-State dispute resolution mechanism (article 11), separately and in addition to that under its individual communications mechanism (article 14), appears to anticipate the classic situation "in which a State has adopted the cause of its [own] national whose rights are claimed to have been disregarded in another State in violation of international law." *Id.* *See also* Nottebohm Case, 1955 I.C.J. at 12. The rule would apply by analogy, therefore, to the more contem-

This said, and with due deference to the professional diplomats and foreign office legal advisors who will be the ones to draft and prosecute a claim under the ICERD on behalf of the Banyamulenge against the DRC, a suggested articulation of the core violation of the Convention by the DRC Constitution and nationality law follows:

> Whereas the DRC acceded to the ICERD on April 21, 1976, and
>
> Whereas articles 1(1) and 5(d)(iii) of the ICERD require the DRC to guarantee to everyone within its jurisdiction the right to nationality without distinction as to ethnic origin, and without preference based on ethnic origin in the attribution of nationality under Congolese law;[446] and
>
> Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, and article 6 of Law No. 04/024 of November 12, 2004 relative to Congolese Nationality, define Congolese "nationality by origin" in terms of and with reference to ethnic origin, or create a preference based on ethnic origin in the attribution of nationality under Congolese law; [447] and
>
> Whereas article 10, paragraph 2, clause 2, of the DRC Constitution, and article 6 of Law No. 04/024 of November 12, 2004 relative to Congolese Nationality, in so far as each distinguishes on the basis of ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, violate ICERD articles 1(1) and 5(d)(iii);
>
> Therefore, per article 2(1)(c) of the ICERD, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the Constitution, and article 6 of Law No. 04/024 of November 12, 2004 relative to Congolese Nationality, so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

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porary scenario of a State exercising an *erga omnes* obligation to protect non-nationals in another State from violation of a *jus cogens* peremptory norm. *See* Barcelona Traction, 1970 I.C.J. at 32, ¶ 33 (overruling, by *obitur dicta*, previous jurisprudence tending to disallow such practice). *See also* Stephen M. Schwebel, *The Treatment of Human Rights and of Aliens in the International Court of Justice, in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 327, 333-337 (Vaughan LoSchwebelwe & Malgosia Fitzmaurice eds., 1996).

[446] ICERD arts. 1(1) & 5(d)(iii).

[447] DRC CONST. art 10.

The reader surely will note that this language tracks, nearly verbatim, the allegations made in the DRC Constitutional Court with regard to violations of the ICERD.[448]

In the unlikely event that the CERD does not find that the DRC Constitution and nationality law violate the ICERD as alleged, then pursuant to article 22 of the ICERD the State Party champion should refer the question "to the International Court of Justice for decision."[449] Although the Court "should 'ascribe great weight' to the interpretation" of a treaty made by the very body created by its terms to render such interpretations, the Court is "'in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [treaty] on that of the Committee.'"[450] In fact, the Court very recently overruled the CERD's erroneous interpretation of the phrase "national or ethnic origin"[451] as including the two separate concepts of ethnic origin *and* citizenship, in order to clarify that "the term 'national origin'…does *not* encompass current nationality."[452]

5. The African Court on Human and Peoples' Rights

According to the proposed litigation strategy (see Flow Chart at Appendix II), the case will arrive at the African Court directly from the African Commission only in the scenario where

[448] *Compare with* suggested allegations in the Constitutional Court, at Appendix III.
[449] ICERD art. 22. *See* SHABTAI ROSENNE, ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 85 (6th rev. ed. 2003) ("Provided that it has mainline jurisdiction" such as that provided in the ICERD, "the International Court of Justice may act as an instance of appeal or other reference from other international judicial or quasi-judicial bodies."). *See infra* section III.B.6.
[450] Qatar v. United Arab Emirates, Judgment, 2021 I.C.J. at 32, ¶ 101 (quoting Amadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, 2010 I.C.J. 639, 664, ¶ 66 (Nov. 30) (reviewing a Human Rights Committee interpretation of the ICCPR)).
[451] ICERD art. 1(1).
[452] 2021 I.C.J. at 28, ¶ 88 (emphasis added). *See supra* notes 166-216 and accompanying text.

the plaintiffs do not prevail in the Commission, but had beforehand obtained a positive CERD determination.[453] Otherwise, the case will arrive at the African Court from the CERD.[454]

Nevertheless, the African Court is established, per its Protocol, in order "to complement and reinforce the functions of the African Commission,"[455] and "shall…complement [the Commission's] protective mandate."[456] As such, and as a result of the prescribed methods of accessing the Court in contentious cases,[457] a State Party "applicant" (as the African Court calls a claimant or petitioner)[458] may not bypass the Commission and file solely in the Court,[459] unless it is acting on behalf of one of its citizens.[460] Instead, the Banyamulenge's State Party champion would have to file concurrently in both the Commission and the Court,[461] with a concomitant request that only the Court consider the claim and, if granted, then withdrawing the matter from before the Commission.[462] Given the express nature of the Court as complementary of the Commission, it is hard to imagine a scenario in which the Court would grant such a request and

[453] Or, unlikely, the plaintiffs had obtained an International Court of Justice (ICJ) judgment on appeal from a negative CERD determination, and then went to the Commission for want of an African State Party champion. *See supra* notes 449-450 and accompanying text.
[454] Or, unlikely, the case arrives from the ICJ, to enforce a judgment on appeal from a negative CERD determination, the plaintiffs having an African State Party champion. *See infra* notes 474-476 and accompanying text.
[455] Afr. Ct. Protocol eighth preambular paragraph.
[456] Afr. Ct. Protocol art. 2.
[457] Afr. Ct. Protocol art. 5(1).
[458] Afr. Ct. Protocol art.1 (definitions).
[459] Afr. Ct. Protocol art. 5(1). Individuals and NGOs may do so, under Protocol article 5(3), but even then the Court, in its discretion, may transfer the case to the Commission, per article 6(3).
[460] Afr. Ct. Protocol art. 5(1)(d).
[461] Afr. Ct. Protocol art. 5(1)(b) (Among those "entitled to submit cases to the Court" is "the State Party which has lodged a complaint to the Commission.").
[462] Rules of Court, African Court on Human and Peoples Rights, Sep. 1, 2020, Rule 37(1), http://www.african-court.org/wpafc/wp-content/uploads/2020/10/4-RULES-OF-THE-COURT-25-September-2020.pdf ("The Court shall not consider any application or request for advisory opinion relating to a matter pending before the Commission, unless the matter has been formally withdrawn.") [hereinafter Afr. Ct. R.].

not mandate that the Commission first weigh-in. To-date, no State Party has filed a case against another in the African Court.[463]

As a matter of judicial economy, therefore, the State Party applicant should file not a contentious case but, rather, an application for an Advisory Opinion. Granted, an Advisory Opinion is not an *adjudication* of the causes of action, and its recommendations are not binding. However, depending on the diplomatic climate prevailing at the time,[464] in the event of non-compliance with an Order adjudged by the Court, the end result may be practically the same as non-compliance with a recommendation: in either case the ultimate sanction which the Court may levy is to "report the non-compliance to the Assembly" of Heads of State and Governments of the African Union.[465] To-date, only one Request for Advisory Opinion has (purportedly) been filed by a State Party, which was dismissed for lack of proof of representation.[466]

More important, however, either a positive or negative judgment from the African Court most likely would preclude further review in the International Court of Justice (ICJ), by operation of article 28 of the African Court Protocol,[467] and the principle of *res judicata.*[468] Even assuming a favorable judgment by the African Court, the only cause of action afterwards would be breach of an obligation under article 30 of the Protocol[469] for failure to comply with the

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[463] *African Court Cases: Statistics*, AFR. CT. HUM. PEOPLES' RTS., https://www.african-court.org/cmpt/statistic (last visited Mar. 3, 2021) (of the 310 applications received since the Court's inception, to-date 288 have been filed by individuals, 19 by NGOs, and 3 by the Commission).

[464] For instance, if diplomatic stigma is minimal or non-existent for the disregard of a human rights treaty obligation, which non-compliance with a judgment of the African Court would constitute. *See* Afr. Ct. Protocol art. 30, Execution of Judgment ("The States Parties…undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.").

[465] Afr. Ct. R. 81(4).

[466] Request for Advisory Opinion by Advocate Marcel Ceccaldi on Behalf of the Great Socialist Peoples' Libyan Arab Jamahiriya, No. 002/2011, Order, Afr. Ct. Hum. Peoples' Rts. (Mar. 30, 2012), https://www.african-court.org/cpmt/ storage/app/uploads/public/5fd/9d2/f37/ 5fd9d2f37a868770648724.pdf.

[467] Afr. Ct. Protocol art. 28(2) ("The judgment of the Court decided by majority shall be final and not subject to appeal.").

[468] VILJOEN, *supra* note 131, at 456.

[469] *Supra* note 463.

Court's judgment – *not* for violation of the ICERD, as the Court's judgment on that issue "shall be final."[470] In other words, the African Court, by having *adjudged* the claim arising under the ICERD, will have exhausted the "compromissory" jurisdiction given by the ICERD[471] to the International Court of Justice over that claim.[472] In such an event, unless the State Party champion also has accepted the ICJ's so-called "compulsory" jurisdiction to hear claims arising under treaties generally[473] (such as enforcement of an obligation arising under the African Court Protocol) then no further forum would be available.[474]

Therefore, despite the apparent strength of their case, this author strongly recommends that the Banyamulenge seek not a judgment, but rather an Advisory Opinion from the African Court. The exception to this rationale (based on *res judicata* concerns, not judicial economy) would be in the unlikely event that the Banyamulenge come to the African Court not from the Commission or the CERD, but from the International Court of Justice itself.[475] This would be the scenario where (a) they do not prevail in the CERD and therefore appeal to the ICJ,[476] (b) the ICJ corrects the erroneous ICERD interpretation and enters an appropriate order,[477] and then (c) they

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[470] *See supra* note 466.
[471] ICERD art. 22.
[472] *See infra* notes 492, 506, 511-512 and accompanying text.
[473] By having made the necessary declaration under article 36(2) of the Statute of the International Court of Justice (*see infra* notes 490-491 and accompanying text), and thereby:

> Recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; [or] (c) the existence of a fact which, if established, would constitute a breach of an international obligation….

Charter of the United Nations, Statute and Rules of Court and Other Documents, 2007, I.C.J. Acts & Docs. 6, art. 36(2). The DRC has made the necessary declaration, but many other States have not, notably Rwanda and South Africa. *See* Declarations Recognizing the Jurisdiction of the Court as Compulsory, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/ declarations (last visited Dec. 30, 2020).
[474] Unless of course another State Party champion which *has* made that declaration is willing to pick up the case and prosecute it in the World Court.
[475] *See* Litigation Strategy Flow Chart, *infra* at Appendix II.
[476] *See supra* notes 449-452 and accompanying text.
[477] An "interlocutory appeal" to the ICJ, requesting an Advisory Opinion without deciding the dispute (which would accord with the intent of keeping the controversy regional, avoiding as much as possible the appearance of paternalism or Western interference), would not be available, as only organs and agencies of the United Nations

bring that ICJ judgment to the African Court for enforcement (and in that suit also bring their claims under the African Charter and the ICCPR).

Moreover, the procedure for obtaining an Advisory Opinion in the African Court, as opposed to a contentious case, is comparatively streamlined. Upon receipt of the Request, the Court's Registrar will forward it to all Member States of the African Union, the Commission, any relevant organs of the African Union, and "any other relevant entities,"[478] inviting comment within 90 days.[479] Thus, maximum Pan-African diplomatic and political exposure of the case is achieved up-front. This also gives a diplomatic means of participation to States which may be sympathetic to the cause but are reticent about accusing a fellow African State. Plus, the Commission, as well as civil society and other organizations invited by the Court,[480] will be able to submit views without imposing a separate procedure. After "consideration of all the written submissions," the Court may "on an exceptional basis" hold a public hearing.[481] The Court thereafter issues its Advisory Opinion.

Regardless of the path which has led them to the African Court, once there the Banyamulenge will be able to plead all causes of action it originally brought in the DRC Constitutional Court. This is due to the African Court explicitly having jurisdiction over "all cases and disputes submitted to it concerning the interpretation and application of the Charter, [the] Protocol, and any other relevant Human Rights instrument ratified by the States concerned."[482] Hence the importance of pleading each cause of action separately in the

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Organization are entitled to request an Advisory Opinion of the ICJ, not States. UN Charter art. 96 & ICJ Statute art. 65. *See generally* ROSENNE'S THE WORLD COURT, *supra* note 449, at 86-89.

[478] Afr. Ct. R. 83(2).

[479] Afr. Ct. R. 84(1).

[480] Afr. Ct. R. 83(2). The State Party requesting the Advisory Opinion, in its submissions, should include any briefs from civil society organizations which it deems relevant and helpful, in order to ensure inclusion of such material in the file.

[481] *Id.*, Rule 84(2).

[482] Afr. Ct. Protocol art. 3.

Constitutional Court – under the Convention, the Covenant, and the Charter. In the African Court, the allegations of violation will be nearly verbatim as those in the Constitutional Court,[483] simply rearranging them to plead first the violations under the Charter itself, followed by the ICERD and the ICCPR.

6. The International Court of Justice

Under the proposed litigation strategy, the Banyamulenge will arrive at the International Court of Justice from either (1) the CERD (having not prevailed there) or, hopefully and more likely, from (2) the African Court (having obtained an Advisory Opinion, not a judgment), after having either (a) not prevailed in the African Court, or (b) having prevailed, the DRC government still does not take steps to rescind the offending constitutional provision and law.

As in the CERD and the African Court, a State Party champion is necessary in the ICJ – but not due to any particular choice made by the DRC in making declarations *vel non* under jurisdictional instruments: the ICJ is open uniquely to States. Moreover, to talk of a "State Party" to the ICJ's constitutive instrument may be redundant, as every State which is a member of the United Nations, by ratifying the Charter of the United Nations, becomes "*ipso facto*" a party to the Statute of the ICJ.[484] Per U.N. Charter article 92, the ICJ's Statute is appended to and "forms an integral part of the" U.N. Charter.[485]

This is not, however, to say that every U.N. Member State is, *ipso facto*, subject to the jurisdiction of the ICJ, far from it. Simply being a member of the United Nations, and avowedly committed to the peaceful resolution of international disputes,[486] "does not imply any direct and

[483] *See* suggested allegations in the Constitutional Court, at Appendix III, *infra*.
[484] UN Charter art. 93.
[485] UN Charter art. 92.
[486] UN Charter preamble & arts. 33-38.

separate commitment to the principle of the *judicial* settlement of international disputes."[487] The terms of the ICJ's Statute are such that they do not, by their own operation, confer any jurisdiction. Rather, the ICJ Statute, being in the nature of an international agreement, is scrupulously deferent to the concept of State sovereignty, and a sovereign State cannot be haled into the ICJ against its will.

The ICJ's jurisdiction to adjudge disputes[488] takes three forms. The first is merely being available as a court to which two or more States may come, voluntarily and on an *ad hoc* basis, for judicial resolution of a dispute they are unable to resolve otherwise. This form of jurisdiction is described simply as that which "comprises all cases which the parties refer to it."[489] The other two are the Court's "compulsory" and its "compromissory" forms of jurisdiction, as practitioners call them.[490]

The former was awkwardly labeled but the moniker stuck. Deriving from an international agreement and hence respectful of State sovereignty, it is not "compulsory" as that term commonly is understood. Rather, it is a provision of the ICJ Statute under which States may, voluntarily of course, lodge a separate declaration by which they agree, on a standing basis, to be sued in the ICJ by States which have lodged the same declaration.[491] The latter form of jurisdiction, "compromissory," has a more apt title. In the nature of compromise, a treaty may be negotiated to include a built-in mechanism for resolving future disputes which may arise under the treaty. Such a mechanism may include referral of the dispute to the ICJ for adjudication, and part of the compromise may be the imposition of certain prerequisites before jurisdiction can lie.

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[487] SHABTAI ROSENNE, PROVISIONAL MEASURES IN INTERNATIONAL LAW 34 (2005) (emphasis added).
[488] As distinct from rendering advisory opinions.
[489] ICJ Statute art. 36(1), cl. 1.
[490] *See generally* ROSENNE'S THE WORLD COURT, *supra* note 449, at 67-89.
[491] ICJ Statute arts. 36(2)-(4); *see supra* note 472.

The ICJ Statute refers to this form simply as jurisdiction which is "specially provided for in treaties and conventions in force."[492]

As to the "compulsory" form of ICJ jurisdiction, of the total 193 Member States of the United Nations,[493] only 74 States[494] currently subject themselves to it. Among these counts the DRC, having made its declaration under the ICJ Statute on February 8, 1989, without reservation or special understanding.[495] However, the State with the closest historical and ethnic affinities to the Banyamulenge and, presumably, the greatest motivation to take up the mantle of their cause, Rwanda, has not. Nor has that well-developed sub-Saharan African State with a wide interest in Southern and Pan-African stability: The Republic of South Africa. Many other African States have made the declaration,[496] but it is hard to imagine the Banyamulenge's cause motivating any of these enough so as to adopt it as part of their foreign policy, requiring concerted and sustained diplomatic effort throughout many years, against a fellow African State. Similarly, it is hard to imagine those non-African States with sizeable Congolese diasporas who also have made the declaration, such as Canada, the United Kingdom, Italy, Belgium or Germany,[497] committing their foreign policies to such litigation, *erga omnes* obligations notwithstanding.[498] Moreover,

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[492] ICJ Statute art. 36(1), cl. 3.
[493] *Who are the Current Members of the United Nations?*, DAG HAMMARSKJÖLD LIBRARY, undated, https://ask.un.org/faq/14345, (last visited Mar. 6, 2021).
[494] *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. J., undated, https://www.icj-cij.org/en/declarations (last visited Mar. 6, 2021) [hereinafter ICJ Declarations]. Some States previously had made the necessary declaration under ICJ Statute art. 36(2) but later rescinded it, even during the course of litigation. *See, e.g.,* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. 14, 17, ¶ 10 (June 27); United States Department of State, *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 DEP'T ST. BULL. 67 (Jan. 1986). *See generally* J. Patrick Kelly, *The International Court of Justice: Crisis and Reformation*, 12 YALE J. INT'L L. 342 (1987) (commenting on withdrawals of article 36(2) declarations made before the United States' in 1986, notably by France, China and Iran, and the practice of withdrawing and re-entering with conditions by the UK, Portugal, and others).
[495] ICJ Declarations, *supra* note 494.
[496] Among these are, from a cursory review of the ICJ Declarations: Bostwana, Cameroon, Côte d'Ivoire, Egypt, the Gambia, Kenya, Lestho, Liberia, Madagascar, Malawi, Mauritius, Nigeria, Senegal, Somalia, Sudan, Swaziland, Togo, and Uganda. *Id*.
[497] *See id*.
[498] *See supra* note 428. One should not, however, dismiss out of hand such a potential humanitarian-diplomatic interest; particularly by the most highly developed countries which have made the declaration, which are without an

many, if not most, of the African States mentioned have their own problematic idiosyncrasies of nationality and ethnicity, as documented by the work of the African Commission culminating in its Resolution on the Drafting of a Protocol to the African Charter on the Right to Nationality in Africa,[499] the U.N. High Commissioner for Refugees,[500] and many academic experts.[501]

As to the treaty-specific "compromissory" form of ICJ jurisdiction, of the three international human rights instruments discussed, the ICERD, the ICCPR and the African Charter, only the ICERD's built-in dispute resolution mechanism includes the possibility of referral to the ICJ. Neither Part IV of the ICCPR[502] which defines the Human Rights Committee mechanism, nor its Optional Protocol[503] which permits individuals and NGOs to participate in that mechanism, mention the ICJ. Nor do either the African Charter[504] which creates the African Commission, or its Protocol on Establishment of the African Court.[505] In fact, the latter speaks of a judgment by that Court as being final.[506]

Both the DRC and Rwanda have ratified the ICERD.[507] As mentioned previously, the DRC did so without reservation.[508] Rwanda, on the other hand, prior to the 1994 genocide, had lodged a reservation to article 22 upon acceding to the Convention, the provision which allows suit in the ICJ.[509] In 2008 however, under the new, post-genocide government, Rwanda

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African colonial legacy, and which donate regularly to African humanitarian or stability operations, either unilaterally, in conjunction with the European Union, or both, notably Austria, Denmark, Finland, Hungary, Luxembourg, the Netherlands, Norway, and Sweden. *See* ICJ Declarations, *supra* note 494.

[499] *Supra* note 358; AFR. COMM'N HUM. PEOPLES' RTS., THE RIGHT TO NATIONALITY IN AFRICA, *supra* note 300.

[500] *See* Manby, *supra* note 169 (writing on behalf of U.N. High Commissioner for Refugees).

[501] *See, e.g.*, BRONWEN MANBY, CITIZENSHIP IN AFRICA: THE LAW OF BELONGING (2018); Deng, Abdi et al., and Blitz et al., *supra* note 207; K. Anthony Appiah, *Grounding Human Rights, in* HUMAN RIGHTS AS POLITICS AND IDOLATRY 101 (Michael Ignatieff ed., 2001).

[502] ICCPR arts. 28-45.

[503] ICCPR Optional Protocol, *supra* note 400.

[504] Afr. Charter, *supra* note 141.

[505] Afr. Ct. Protocol, *supra* note 283.

[506] Afr. Ct. Protocol art. 28(2) (text at note 467, *supra*).

[507] *See* ICERD Table, *supra* note 142.

[508] *Id*.

[509] *Id.*, n.31.

rescinded the previous government's reservation to article 22, accepting ICJ jurisdiction under and per the ICERD.[510]

The contours of the ICJ's "compromissory" jurisdiction under the ICERD are, per the ICJ Statute, as "specially provided for"[511] in ICERD article 22. That provision reads:

> Any dispute between two or more State Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.[512]

Therefore, four preconditions must be met in order to establish jurisdiction in the ICJ: that (1) the request for decision involves an actual dispute between the parties,[513] that (2) the dispute is not

[510] *Id.* Ironically, the immediate post-genocide Rwandan government had benefitted by the previous government's reservation to Convention article 22, in the ICJ suit brought against it by the DRC during the military stalemate of the Second Congo War. In that case, the DRC had asked the Court to order, inter alia, Rwanda to withdraw its forces from Congolese territory, alleging claims arising under various instruments, including the ICERD. On the DRC's request for preliminary injunctive relief ("provisional measures"), the Court found that Rwanda made a *prima facia* showing of a lack of jurisdiction over, inter alia, the ICERD claim due to the article 22 reservation, and refused to grant preliminary injunctive relief. *See* Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) [DRC v. Rwanda], Provisional Measures, Order, 2002 I.C.J. 219, 249 (July 10). The Court later found it lacked jurisdiction and dismissed the case. *See* DRC v. Rwanda, Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, 53 (Feb. 3) (the DRC had continued to pursue the case, for reparations, after Rwanda had withdrawn its forces pursuant to the peace accords of 2002). The DRC had also filed similar cases against Burundi and Uganda. The case against Burundi was dismissed along the same lines as that against Rwanda. However, the case against Uganda stood, as jurisdiction was founded "on the declarations of acceptance of the compulsory jurisdiction of the Court made by the two States." *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Overview of the Case*, INT'L CT. J., https://www.icj-cij.org/en/case/116 (last visited Mar. 8, 2021). This case is still pending as of this writing; the Court recently appointed experts to assist it in assessing damages against Uganda. *See* Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order, 2020 I.C.J. __, Gen. List No. 116 (Oct. 12).

[511] ICJ Statute art. 36(1), cl. 3.

[512] ICERD art. 22.

[513] Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Request for the Indication of Provisional Measures (Qatar v. United Arab Emirates) [Qatar v. UAE, Provisional Measures], 2018 I.C.J. 406, 414 (July 23).

settled by negotiation[514] or (3) by the mechanism of article 11[515] discussed above,[516] and that (4) "the parties have not agreed to another mode of settlement."[517]

In stating *four* preconditions and not *three* – by splitting the "not-settled" precondition into two – this author speaks in the context of the litigation strategy: anticipating contingencies and preparing to meet them. Because the language in the second clause of article 22 lacks the word *either*, an ambiguity exists as to "whether negotiations and recourse to the procedures referred to in article 22 of [ICERD] constitute alternative or cumulative preconditions."[518] A plain reading of article 22 would indicate the former, as the latter normally would require the conjunctive *and*. However, the conjunctive *or* may be used to express the idea *and/or*.[519] The question has come before the ICJ, but the Court has declined to answer, because either (1) the condition(s) was (were) not necessary to the preliminary injunction proceedings in which the issue was raised,[520] or (2) neither condition had been met.[521] The Court has yet squarely to confront and resolve the question. Likewise, recent ICERD litigants had proffered that the

[514] *Id.* at 417
[515] *Id.* at 420.
[516] *Supra* section III.B.4 (the CERD procedure). The reader surely will note that use of the present-tense "which is not settled" renders, literally, a mere statement of fact, regardless of whether attempts to settle were made, and exposes the sentence to ambiguity. The State of Georgia actually made this argument, which the Court rejected, on the principle that words in treaties must be given appropriate effect wherever possible, and moreover that the French language version employs the future perfect tense ("which will not have been") which is less open to ambiguity. Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment [Georgia v. Russia], 2011 I.C.J. 70, 125-126, ¶ 133 (Apr. 1).
[517] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order [Ukraine v. Russia], 2017 I.C.J. 104, 120, ¶ 42 (Apr. 19).
[518] Qatar v. UAE, Provisional Measures, 2018 I.C.J. at 420-421, ¶ 39; Ukraine v. Russia, 2017 I.C.J. at 125-126, ¶ 60.
[519] FOWLER'S CONCISE MODERN ENGLISH USAGE 47 (Jeremy Butterfield ed., 3d ed. 2016).
[520] Qatar v. UAE, Provisional Measures, 2018 I.C.J. at 420-421, ¶ 39; Ukraine v. Russia, 2017 I.C.J. at 126, ¶¶ 60-61. The term "preliminary injunction" is used colloquially for the benefit of common-law jurisdiction readers who may not be familiar with international practice; the term used by the ICJ is "provisional measures."
[521] Georgia v. Russia, 2011 I.C.J. at 140.

preclusive principles of *electa una via*[522] (choosing one remedy forecloses another) and *lis pendens*[523] (where one process, such as negotiation, is ongoing others are foreclosed) apply to the preconditions of article 22, but the Court summarily set those questions aside as not applicable to the preliminary injunction proceedings in which they were raised.[524]

As to the third precondition, exhaustion of the CERD remedy, the case will not have arrived at the ICJ under this litigation strategy without first having been through the CERD and, hopefully, also through the African Court.

As to both the second precondition (exhaustion of negotiation), and also the first (proof of an actual dispute between the parties), the State Party champion should make a formal démarche to the government of the DRC, by which it both (1) establishes the existence of a dispute under the ICERD and also (2) offers to negotiate a settlement of that dispute. The State Party champion should make this démarche as early in the litigation strategy as possible, but no later than upon conclusion of proceedings in the forum preceding the ICJ – i.e., immediately following the outcome in the DRC Constitutional Court, the African Court or a negative outcome in the CERD. By its démarche to the DRC, the State Party champion should, for example:

(1) Re-state its position that it feels compelled, in light of the history of strife, conflict and war between the two nations, and further to the many exchanges between them throughout the years,[525] to exercise the *erga omnes* obligation to protect the Congolese people, including but not limited to those of Tutsi ethnic origin, from racial discrimination or preference on the basis

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[522] *Electa una via, non datur recursus ad alteram*: "He who has chosen one way cannot have recourse to another." BLACK'S LAW DICTIONARY, *supra* note 19, at 608.
[523] Literally, "a pending suit." *Id.* at 1081. *Lis*: "Latin, A controversy or dispute; a suit or action at law." *Id*. at 1080.
[524] Qatar v. UAE, Provisional Measures, 2018 I.C.J. at 421, ¶ 39.
[525] *See* Qatar v. UAE, Provisional Measures, 2018 I.C.J. at 417, ¶ 27; Ukraine v. Russia, 2017 I.C.J. at 125, ¶ 59; Georgia v. Russia, 2011 I.C.J. at 120, ¶ 113 (each describing evidence of a pre-existing dispute relating to the subject of the case, such as private (diplomatic notes and démarches) or public exchanges discussing the underlying facts constituting the alleged ICERD violation).

of ethnic origin in the attribution of nationality under Congolese law, which violates articles 1(1) and 5(d)(iii) of the ICERD (and, if following unfavorable views by the CERD or an unfavorable opinion by the African Court, differentiating those views or opinion);

(2) Declare it to be its official policy vis-à-vis the DRC, pursuant to the afore-mentioned *erga omnes* obligation and the mutual obligations contained in the ICERD, to support and foster the amendment, rescindment or nullification of article 10, paragraph 2, clause 2, of the Constitution of the DRC, and article 6 of DRC Law No. 04/024 of November 12, 2004, so as not to define "nationality by origin" on the basis of or with reference to ethnic origin;

(3) Offer its good offices to negotiate a non-litigious resolution of the dispute and to assist with drafting a new Congolese law of nationality by origin, in accordance with African Commission Resolution 234 on the Right to Nationality of Apr. 23, 2013,[526] the Draft Protocol to the African Charter on the specific aspects of the Right to a Nationality and the Eradication of Statelessness in Africa,[527] and the Declaration of the International Conference on the Great Lakes Region (ICGLR) Member States on the Eradication of Statelessness of October 16, 2017;[528] and

(4) Ask for a reply by a time certain.

The State Party's Ministry of Foreign Affairs and Embassy in Kinshasa should make regular follow-up. If negotiations ensue and lead toward the stated goal, great. If not, then suit in the

[526] *Supra* note 301.
[527] *Supra* note 359.
[528] Declaration of the International Conference on the Great Lakes Region (ICGLR) Member States on the Eradication of Statelessness, 16 October 2017, https://www.refworld.org/docid/ 59e9cb8c4.html (last visited Sep. 25, 2020). Memorializing that its signatories, including the Foreign Minister of the DRC, declare both to "Commit to prevent and eradicate statelessness by reforming laws and policies related to nationality in order to include appropriate safeguards against statelessness, in particular to ensure that every child acquires a nationality at birth…," and also to "Support and encourage the African Union to conclude the draft protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality and the Eradication of Statelessness in Africa." *Id. at* 3-4, 5th & 9th Declarations.

ICJ may ensue. The key is that a genuine, good faith attempt at negotiating a settlement is required; "mere protests or disputations" will not do.[529]

The fourth precondition, that "the parties have not agreed to another mode of settlement,"[530] may seem self-evident. Nevertheless, it indicates that, in recruiting and assessing the viability of a State Party champion, all standing bi-lateral and multi-lateral agreements between it and the DRC must be reviewed for the indication of any mandatory process of dispute resolution. For example, it is conceivable that one could be written into sub-regional cooperative agreements; if so, by all means if the claim is within the competence of such a forum, it should be pursued therein prior to the ICJ. This author is unaware of any such mechanisms currently in force between the DRC and its most likely State Party champions.[531] Moreover, before arriving

[529] Georgia v. Russia, 2011 I.C.J. at 132, ¶ 157.
[530] Ukraine v. Russia, 2017 I.C.J. at 120, ¶ 42.
[531] The International Conference on Peace, Security, Democracy and Development in the Great Lakes Region (ICGLR), established in 2004 and of which the DRC is a founding member, has not created any tribunal or other formal mechanism for the resolution of disputes concerning the violation of international human rights norms, although its Pact does obligate its Member-States to "undertake to settle their disputes peacefully…through negotiation, good offices, investigation, mediation, conciliation or any other political means within the framework of the Conference's Regional Follow-up Mechanism," which mechanism is established "in order to ensure the implementation of [the] Pact;" the Pact itself does not invoke any international human rights instrument or international human rights norms generally, other than expressing the desire to develop "programmes of action" whereby "the Member States undertake to entrench…respect for human rights" and to "establish regional mechanisms…to promote human rights." The Pact on Security, Stability and Development For the Great Lakes Region, December 2006 Amended November 2012, arts. 18, 22 & 28, INT'L CONF. OF THE GREAT LAKES REGION, http://www.icglr.org/images/Pact%20ICGLR% 20Amended%2020122.pdf.

The Southern African Development Community (SADC), established in 1992 and which the DRC joined in 1998, had established a tribunal, but which was suspended in 2010 by the SADC Heads of State and Government, pending re-organization under a revised protocol which excludes jurisdiction over international human rights norms; which protocol, signed by nine States in 2014, has yet to receive enough ratifications to enter into force. *See Southern African Development Community Tribunal*, INT'L J. RES. CTR., https://ijrcenter.org/regional-communities/southern-african-development-community-tribunal/ (last visited Mar. 8, 2021).

The East African Community (EAC), launched in 2000 and to which the DRC now is "fast tracked" for membership,* by its constitutive instrument established the East African Court of Justice. Treaty for the Establishment of the East African Community, Chapter 8, arts. 23-47, Nov. 30, 1999, amended Dec. 14, 2006 & Aug. 20, 2007, https://www.eacj.org//wp-content/ uploads/2012/ 08/EACJ-Treaty.pdf. The treaty requires a special protocol to confer "human rights jurisdiction" upon the Court (*Id*., arts. 27 & 30), which is envisioned. *See Strategic Plan 2018-2023*, EAST AFRICAN COURT OF JUSTICE (Apr. 2018), https://www.eacj.org/ wp-content/ uploads/2013/ 09/EACJ-Strategic-Plan-2018-2023.pdf. **See* Aggrey Mutambo, *A New Scramble for DR Congo Begins in Earnest as Tshisekedi Steadies the Ship*, THE EAST AFRICAN (Apr. 26, 2021), https://www.theeastaffrican.co.ke/tea/rest-of-africa/scramble-for-dr-congo-3376624.

at the ICJ the matter, hopefully, will have been through the African Court. Yet even if it arrives directly from the CERD, the African Court Protocol does not purport to obligate its adherents to any compulsory recourse (other than exhaustion of national remedies) prior to the African Court.[532]

IV. Enforcement

Completion of the case in the International Court of Justice will conclusively resolve the central question of whether the DRC Constitution and nationality law violate the ICERD: per article 60 of the Court's Statute, "the judgement is final and without appeal."[533] The next and last sentence of the article reads: "In the event of a dispute as to the meaning or scope of the judgement, the Court shall construe it upon the request of any party."[534] The plain language of the Statute makes clear that the ICJ retains all jurisdiction concerning interpretation of its judgments, and forecloses review by any other judicial forum. Under the present strategy, in the unlikely scenario of a judgment on appeal from the CERD,[535] a suit thereafter in the African Court would not be to *interpret* the ICJ's judgment, but to *enforce* it.[536]

Apart from such a regional contingency,[537] the U.N. Charter provides the sole mechanism under positive law for enforcing an ICJ judgment on the international plane: referral of the matter to the U.N. Security Council. Charter article 94, second paragraph, provides:

> If any party to a case [decided by the ICJ] fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council,

[532] Afr. Ct. Protocol, *passim*.
[533] ICJ Statute art. 60, cl. 1.
[534] ICJ Statute art. 60, cl. 2.
[535] *See* Litigation Flowchart at Appendix II, *infra*.
[536] *See supra* notes 474 - 475 and accompanying text.
[537] For instance, petitioning the African Court for enforcement of an ICJ judgment, and then availing of the African Court's enforcement mechanism of reporting to the African Union Assembly of Heads of State and Government per Afr. Ct. R. 81(4) and Afr. Ct. Protocol art. 31 (*see supra* note 465 and accompanying text). This would not preclude seizin of the U.N. Security Council; neither after, nor concurrently, with seizin of the A.U. Assembly.

> which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[538]

It is important, however, to take note of article 94's first paragraph:

> Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.[539]

First and foremost, therefore, it devolves upon each U.N. Member State to comply with ICJ decisions as an obligation owed to all other Member States. The general duty of good faith, implicit in any agreement,[540] is made explicit by Charter article 2:

> All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.[541]

Therefore, despite some "widely publicized slaps"[542] to the Court's authority and stature by certain States,[543] "only on a few occasions have States openly and willfully chosen to disregard the Court's judgments."[544] On the contrary, the Court's "overall record of compliance…should be viewed as a positive one,"[545] as "it has enjoyed many more hushed victories, playing a crucial role in settling for good some delicate disputes."[546] The court is, after all, an integral part of the

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[538] UN Charter art. 94(2).
[539] UN Charter art. 94(1).
[540] The duty of good faith is "perhaps the most important principle of international law." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. a (AM. L. INST. 1987) (Because the Fourth Restatement does not supersede § 321 (which speaks of international "agreements"), it and its comments "remain the position of the American Law Institute." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES xvii, 491 & 494 (AM. L. INST. 2018) (Foreword and Parallel Tables 1 & 2)). *Cf.*, Vienna Convention on the Law of Treaties, *supra* note 148, art. 26 ("Every *treaty* in force is binding upon the parties to it and must be performed in good faith.") (emphasis added). International law ascribes to this duty the maxim *pacta sunt servanda*. THOMAS BUERGENTHAL AND HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 104 (1985).
[541] UN Charter, *supra* note 170, art. 2(2).
[542] Cesare P.R. Romano, *General Editor's Preface, in* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE vii (2004).
[543] *See supra* note 494.
[544] SCHULTE, *supra* note 542, at 271.
[545] *Id.*
[546] Romano, *id.* at vii.

United Nations Organization, its Statute packaged inseverably with the U.N. Charter, which all Members execute and ratify automatically upon accession to Organization membership.

Thus, on the world stage, the community of nations will expect the DRC to comply with the adjudication made by the community's designated judicial organ. The many years of litigation in the various regional and international fora – particularly the exceptionally wide one of the African Court sitting in an Advisory capacity[547] – will have instilled a learned awareness of the issue upon the International Community. This heightened awareness should result in pressure on the DRC from many quarters to comply with the ICJ's judgment. Pressure from economic quarters, as multinational commercial interests realize that compliance is fundamental to de-legitimizing the endemic so-called ethnic[548] violence which impedes fair access to the DRC's primary mineral resources. Pressure from ecclesiastic quarters, as principal faith leaders, particularly the Vatican,[549] realize that retaining legal frameworks which perpetuate the

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[547] *See supra* note 477 (all 54 African Union Member States will have been given the opportunity to participate in the proceeding).

[548] *See* Judith Verweijen, *Why violence in the South Kivu Highlands Is Not 'Ethnic' (And Other Misconceptions About the Crisis),* KIVU SECURITY TRACKER (Aug. 31, 2020), https://blog. kivusecurity.org/why-violence-in-the-south-kivu-highlands-is-not-ethnic-and-other-misconceptions-about-the-crisis/ (distinguishes the ethnic factor from other causes of violence; argues that ethnicity is but an exacerbator and multiplier of violence, used by self-centered interests who fuel ethnic conflict to their advantage). What Koen Vlassenroot observed nearly two decades ago still rings true:

> Many observers wrongly reduce what is happening in South Kivu to a revival of ethnic hatreds. The conflict in south Kivu, however, has to be explained as the outcome of an intensified process of renegotiating the political, social and economic space. At a time when existing economic, administrative, and social patterns that had defined this space were increasingly unstable, subject to external penetration, and unable to offer clear contexts within which people could make daily and life-choices, ethnicity often became an excuse for political action and violence. Through the manipulation of ethnicity, political actors tried to cover their real political and economic agendas.

Vlassenroot, s*upra* note 28, at 500-501. Nevertheless:

> So long as the customary sphere distinguished between citizens on the basis of whether they were ethnically indigenous or ethnic strangers, it continued to generate conflict in ethnic terms.

MAMDANI, *supra* note 31, at 262.

[549] The Roman Catholic Church has enormous influence in the DRC. As stated by Belgian expert Kris Berwouts:

> It is the only truly national institution which, through its parishes, its network of associations and its involvement in the education and health sectors is omnipresent in the country…if the conference of bishops decided tomorrow to spread a message, it would be read Sunday during mass in every parish.

Florence Richard, *From Mediator to Mobiliser: The Catholic Church in DR Congo*, FRANCE 24 (Jan. 23, 2018, 6:02 PM), https://www.france24.com/en/20180123-congo-kinshasa-mediator-mobiliser-catholic-church-protest-kabila-

grounding of nationality in ethnicity, is like digging out "cracked cisterns that can hold no water" and thus forsaking "the fountain of living water."[550] Pressure from Pan-Africanists, as they realize that skuttling ethnocentric nationality will more fully liberate Africa and its peoples from the oppressive vestiges of their colonial past.[551] And pressure from diplomatic quarters,[552] as they realize that withdrawing the lynchpin of ethnocentric nationality is essential to a more permanent peace in the Congo and the Great Lakes Region.

As to this last form of pressure, referral of the ICJ judgment to the U.N. Security Council under Charter article 94 will bring the issue to a diplomatic head. Once seized of the matter, the Security Council "may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[553] The Security Council would not deem the matter insignificant, as the organ continues to authorize in the Congo, since 1999,[554] the largest and longest-running of its Peace Keeping Operations.[555]

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monsengwo (quoting Berwouts). *See also* Karen Attiah, *Can the Catholic Church Save Democracy in Congo?*, THE WASHINGTON POST (Jan. 6, 2017, 3:30 PM), https://www.washingtonpost.com/news/global-opinions/wp/2017/01/06/can-the-catholic-church-save-democracy-in-congo/:

> [The Dem. Rep.] Congo has the largest Catholic population in Africa, with around 40 percent of its 67 million people identifying as adherents….While a good portion of Western commentary has made only passing reference to the mediating role of the Catholic bishops, their role has been crucial — and it underlines the importance of Christian institutions in Congo's post-independence politics. In fact, history shows that Congo's Catholic clergy very well might be the force to prevent Africa's second-largest nation — and the surrounding Great Lakes region — from falling into the abyss.

[550] *Jeremiah* 2:13 ("For my people have committed two evils: they have forsaken me, the fountain of living water, and dug out cisterns for themselves, cracked cisterns that can hold no water.").

[551] *See supra* notes 95-101 and accompanying text. As one commentator remarked, "it is paradoxical that [the DRC Constitution was] adopted with significant backing of an internationally negotiated and supported peace process eerily similar to the involvement of departing colonial powers in the adoption of post-independence constitutions." James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109, 1123-1124 (2008) (arguing that "war weariness, more than widespread public involvement in the drafting of the constitution, accounted for its high approval rating.").

[552] Such diplomatic pressure may go beyond mere diplomatic demarches, for example by being made a condition for receipt of foreign assistance.

[553] UN Charter, *supra* note 170, art. 94(2).

[554] S.C. Res. 1279, ¶¶ 4 & 9 (Nov. 30, 1999) (establishing the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).

[555] *See generally MONUSCO Fact Sheet: United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, UNITED NATIONS PEACEKEEPING, https://peacekeeping. un.org/en/mission/monusco (last

It is important to note that, by ratifying or acceding to the Charter, all Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security"[556]– including the Banyamulenge's State Party champion who prevails in the ICJ. However, if the Security Council, having been seized of the matter, does not take measures resulting in compliance with the judgment, then "certain unilateral measures to bring about compliance with an ICJ decision which international law generally provides" may be employed, notably "self-help."[557] Professor Cassese explains what "self-help" means in international law:

> Customary rules provided that if a State violated an obligation imposed by an international rule, it bore international responsibility for such violation. Consequently, it had to make reparation for the breach; by the same token, the injured State was entitled to resort to self-help. Hence it could take forcible action (armed reprisals, war) or non-forcible measures (economic sanctions, suspension or termination of a treaty, etc.) designed either to impel the delinquent State to remedy the wrong, or to 'penalize' that State.[558]

Since the Second World War, the commitment of nation-states "to maintain international peace and security,"[559] under the auspices of the United Nations, has modified the rule thus:

> Whenever international rules are disregarded without the breach falling within the category of 'armed attack,' States are not authorized to react by force. Self-help, although still allowed, must be confined to peaceful reaction to international wrongs.[560]

Following on the heels of what will amount to many years of extensive and thorough litigation, up to and including the World Court, if the dominant political powers in the DRC *still*

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visited Mar. 12, 2021) (Note: MONUSCO is the successor organization to MONUC; per the factsheet, the mission's current annual budget is $1,154,140,500, and has thus far has suffered 206 fatalities).

[556] UN Charter, *supra* note 170, art. 24(1).

[557] SCHULTE, *supra* note 542, at 71.

[558] CASSESE, *supra* note 130, at 242.

[559] UN Charter, *supra* note 170, art. 1(1).

[560] CASSESE, *supra* note 130, at 353.

refuse to de-legitimate racial discrimination, they will prove the DRC not to be "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[561] Because of the DRC's constitutionally-sanctioned racial discrimination, which fuels the hate speech, violence, and incitement to genocide against them,[562] surely the Banyamulenge will by then have earned their right to self-determination.[563] This right already is guaranteed by both the ICCPR[564] and the African Charter.[565] Moreover, "the democratic principle at the heart of" the right gives rise to "an entitlement to remedial secession," "given the evolution of self-determination and human rights during the past centuries."[566] The African Charter even suggests that the Banyamulenge would also have the right to call for and to receive assistance from African States in their exercise of the right.[567] The

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[561] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (Oct. 24, 1970), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc A/8028/PV.1883, at 124, ¶ 1 (seventh unnumbered sub-para. under discussion of "the principle of equal rights and self-determination of peoples") (July 14, 1971).

[562] *See supra* notes 8, 17, 46, 61-62, 78-80, 93 and accompanying text.

[563] *See* Frédéric Mégret, *The Right to Self-Determination: Earned, Not Inherent, in* THE THEORY OF SELF-DETERMINATION 45 (Fernando R. Tesón ed., 2016):

> [I]t is in confronting the dominant polis with one's claim…that one provides it with an opportunity to correct what may need to be corrected, and that one engages in a conversation about what ought to be the most just outcome. If the polis agrees, then the problem is solved; if it does not and does so unreasonably, then the lines are drawn and the group…can proceed from that base line.

Id. at 64.

[564] ICCPR, *supra* note 140, art. 1(1).

[565] Afr. Charter, *supra* note 141, art. 20(1).

[566] Elizabeth Rodriguez-Santiago, *The Evolution of Self-Determination of Peoples in International Law, in* THE THEORY OF SELF-DETERMINATION 201, 235-236 (Fernando R. Tesón ed., 2016). Rodriguez-Santiago describes this evolution as follows:

> Remedial secession is indeed one of the oldest manifestations of self-determination. [It is] found in Grotius's doctrine, as an *extreme necessity* resource; in Vattel's doctrine, as a remedy of last resort when the sovereign had abandoned its people; in the American independence, where remedial secession – inspired by Vattel's doctrine – rested engraved in the Declaration of Independence; and in the movements inspiring the independencies of the Latin American colonies from Spain. During the existence of the League of Nations it was suggested in the Aaland Islands case, and since the evolution of international law after the creation of the United Nations, a recognition of it can be gleaned from the GA resolution 2625 (XXV) and, at a regional level, from the text of the African Charter on Human [and Peoples'] Rights.

Id. at 235 (emphasis in original) (the General Assembly Resolution referenced is the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *supra* note 561).

[567] Afr. Charter, *supra* note 141, art. 20(3) ("All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.").

United Nations General Assembly has even declared that the legitimate "modes of implementing" the right include "the free association or integration" of a properly seceding people "with an independent State;"[568] and that this "constitute[s] a basic principle[] of international law."[569]

A thorough analysis of the right to self-determination as applied to the Banyamulenge's situation is beyond the scope of this thesis.[570] Suffice it to say, whereas some prematurely[571] have invoked it recklessly and irresponsibly,[572] the prosecution and exhaustion of this litigation strategy very well may ripen the right into full vigor.[573] It must be stressed, however, that the

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[568] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *supra* note 561, at 124, ¶ 1 (fourth unnumbered sub-para. under discussion of "the principle of equal rights and self-determination of peoples").

[569] *Id.*, ¶ 3.

[570] For a succinct treatment of the state of the law of self-determination of peoples, *see* ALINA KACZOROWSKA-IRELAND, *Self-Determination of Peoples, in* PUBLIC INTERNATIONAL LAW 575 (5th ed. 2015); *see also* THE THEORY OF SELF-DETERMINATION (Fernando R. Tesón ed., 2016) (collection of essays by contemporary scholars, in the American Society of International Law Studies in International Legal Theory series).

[571] *Cf.*, Jaclyn Leigh Burger, *Geographies of Violence and Geographies of Hope in the Democratic Republic of the Congo: Investigating the Secessionist Deficit of the Congo War*, at 77 (Apr. 9, 2007) (M.A. thesis, American University) (ProQuest, UMI No. 1448700) (Explores why the Congo did not break-up into separate states along ethno-regionalist lines during the Congo Wars, as many expected: "while ethnic differences were crystallized, they did not equate with any particular sense of nationhood which could have served as a legitimate foundation for juridical secession.").

[572] *See, e.g., The Devastating Crisis in Eastern Congo: Hearing Before the Subcommittee on Africa, Global Health, and Human Rights*, *House Foreign Affairs Committee,* 112th Cong. 32 (2012) (statement of Mr. Steve Hege, former member United Nations Group of Experts on the DRC) ("On the day that M23 [a Congolese Tutsi rebel group] reached Goma [Nov. 20, 2012], Rwandan government media surrogates began demanding the 'right of self-determination.'"). *See also* Damien Glez, *RDC: Des Drapeaux d'une "République du Kivu" Fictive Créent la Polémique [DRC: Flags of a Fictive "Republic of Kivu" Create a Stir]*, JEUNE AFRIQUE (July 7, 2020, 4:57 PM), https://www.jeuneafrique.com/1011704/politique/chronique-rdc-des-drapeaux-dune-republique-du-kivu-fictive-creent-la-polemique/ (On the morning of July 1, 2020, flags proclaiming a "Republic of Kivu" appeared around the City of Bukavu, capital of South Kivu Province. Though purportedly a joke, it caused shudders throughout the government and population.).

[573] Likewise, it also is beyond the scope of this thesis to analyze the ethics of resort to arms by the Banyamulenge or armed intervention by third parties. Granted, the manner in which the combined Rwandan/RCD forces prosecuted the war brought upon them by Laurent Kabila in 1998 took them off the moral high ground and denuded them of righteousness. Suffice it to say, however, that prosecuting and exhausting the litigation strategy proposed here certainly would demonstrate a thorough exhaustion of peaceful remedies, and go a long way toward re-establishing the justness of their cause. *See generally* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (5th ed. 2015) (1977); ETHICS BEYOND WAR'S END (Eric Patterson ed., 2012) (contemporary essays on Just War Theory); ERIC PATTERSON, JUST AMERICAN WARS: ETHICAL DILEMMAS IN U.S. MILITARY HISTORY 17 (2019) (useful chart outlining the categories and elements of Just War Theory, which are: (1) *jus ad bellum*, or justifying the resort to war, containing the primary elements of (i) legitimate authority, (ii) just cause and (iii) right intent, and secondary elements of (iv) likelihood of success, (v) proportionality of ends and (vi) last

Banyamulenge wish above all else to be accepted as full, permanent, unconditional, unquestioned and undoubted members of the Congolese nation.[574]

V. Conclusion

The acclaimed missionary Father Vincent Donovan, after spending seventeen years living among and evangelizing the Masai in Tanzania (which borders the Congo), concluded from his long and intimate observations that tribalism, or ethno-centrism, comes directly from the core of original sin. In 1978, he wrote:

> Before I came to Masailand, or even to Africa, I used to wonder, whenever I came cross it, at the insistence [that] the Bible … placed on the *nations*, on the drive towards the *nations*. I used to wonder if this was not, perhaps, an obsession of classical times, that had little meaning for today, for us. It is only since I came to Africa, that I have seen how wrong I was.
>
> The burning hatred, hostility, and prejudice of one race or tribe toward another is the force that has torn apart the Congo and Nigeria since I came to Africa, seared Rhodesia, and is building up to an explosion in South Africa. ... It is the same force Paul and

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resort; (2) *jus in bello*, or the righteous conduct of war, with the elements of (i) proportionality of means and methods, and (ii) discrimination between combatants and civilians; and (3) *jus post bellum*, or the right termination of war, with the elements of (i) order, (ii) justice and (iii) conciliation). *See also* Phoebe N. Okowa, *Congo's War: The Legal Dimension of a Protracted Conflict*, 77 BRIT. Y.B. INT'L L. 203 (2007) (analyzing the Congo Wars under several of these elements insofar as they are reflected in the Law of Armed Conflict or International Humanitarian Law).

[574] *See, e.g.,* Burger, *supra* note 571, at 84:

> The Banyamulenge chose to not seek irredentist incorporation into Rwanda [during the 1998 war], but rather sought to establish local legitimacy in the Congo…"The dispossession by the Congolese state of their status as participants in the system, a blatant case of horizontal inequality, has not resulted in a will to escape the system, but rather in repeated desperate attempts to rejoin it."

(quoting Pierre Englebert, *Why Congo Persists: Sovereignty, Globalization and the Violent Reproduction of a Weak State*, Queen Elizabeth House, Working Paper No. 95 (2003)). *See also* Press Release, Twirwaneho Civil Self-Defense Group (June 15, 2020) (on file with author) ("We inform the Congolese Government that, despite not acknowledging our persecution, we are totally attached to it…") (author's translation); Mécanisme National de Suivi, *Rapport Interne du Forum Intracommunautaire des Banyamulenge du 13-15 Février 2020 au Centre Elais Kinshasa Gombe [Internal Report of the Banyamulenge Intra-Community Forum of 13-15 February 2020 at the Elais Center, Kinshasa Gombe]* (on file with author):

> The plenary assembly insists that the following points be included in the final declaration: *** The Banyamulenge community reiterates its legendary loyalty to the Republic as well as to all institutions committed to working for the establishment of peace and security.

Id. at 22 (author's translation). After all, at base culturally is a "negative historical memory." MAMDANI, *supra* note 31, at 235 ("Rwanda was no subject for a romantic construction of home. Rather, it signified the suffocating tentacles of a centralizing power, something from which to stay away.").

> Peter had to fight against so desperately. The whole Bible squared off against this elementary evil.[575]

Mainstream Congolese society probably will be reticent to jettison ethnicity as a criterion of "nationality by origin." An order from a supra-national court of competent jurisdiction, the product of rigorous litigation examining the foundations of the Congolese nationality-by-ethnic-origin law, would clearly let the Congolese mainstream élite know the "right thing to do,"[576] particularly its influential ecclesiastical sector.[577] Even so, it is quite true that it is impossible to

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[575] VINCENT J. DONOVAN, CHRISTIANITY REDISCOVERED 40 (25th ann. ed., 2003) (1978) (emphasis in original).

The Gospel lays the groundwork for this understanding, in one of Jesus' many debates with the Sadducees and Pharisees, that in which he gave the Summary of the Law. Matthew's account of the encounter begins thus:

> When the Pharisees heard that Jesus had silenced the Sadducees, they gathered together, and one of them, a lawyer, asked him a question to test him. "Teacher, which commandment in the law is the greatest?" He said to him, "'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the greatest and first commandment."

Matthew 22:34-38. But how to translate this into practice, to implement such an order? How is humankind to go about loving God completely and absolutely? The antagonists did not ask that question. Jesus, however, was not about to let them off in the comfort of ambiguity, and before they could change the subject he continued:

> And the second is like unto it: "You shall love your neighbor as yourself." On these two commandments hang all the law and the prophets.

Id. 22:39-40 (KJV 1st stanza). (It is in a later debate, related by Luke, after Jesus had sealed the pair of commandments as being the font of the entire law, when a Pharisee asked "And who is my neighbor?" However, it having been asked in the context of a predicate question personal to the antagonist, "What must I do to inherit eternal life?," Jesus gave the man a personal answer in his typically parabolic fashion: the story of the Good Samaritan. *Luke* 10:25.)

Sin enters socio-political organization when those wielding the power of the State start to define "neighbor" so as to exclude the Other, in order to render him "not a neighbor" but a foreigner, and thus attempt to escape their duty to God to love that other human being whom God has brought within their jurisdiction. And as the collective guilt of such institutional duplicity sets in, the proverbial Pharisee digs in his heels to justify the exclusion, to make the Other less and less like himself, less and less human, soon an animal to be either corralled or herded away, and eventually a rodent or an insect to be exterminated.

Thus, within the geographic confines of a nation-state's borders – its neighborhood – to say that an ethnic group living therein is not part of, or does not belong to, the nation is to exclude that group, to render its members "non-neighbors," and thus not within that State's and its nationals' divine obligation to love as themselves.

[576] *See James* 4:17 ("Anyone, then, who knows the right thing to do and fails to do it, commits sin.").

[577] As stated *supra* note 549, the Catholic Church wields enormous influence in the DRC. Case in point: resolution of the 2016-18 constitutional crisis caused by Joseph Kabila's silence regarding his intentions to respect the Constitution *vel non*, i.e., to organize Presidential elections (already two years overdue) and not run himself (he was in his second and, per the Constitution, last consecutive term). Throughout 2016, his ruling party had let it be known that elections, due in December, would "slide" indefinitely; the National Conference of Bishops stepped in to broker a deal, concluded on December 31st (the Feast of Saint Sylvester), whereby elections would occur in December 2017. That timeframe came and went without action. The Church then – at the initiation of its laity – organized a series of monthly, peaceful post-Mass protest marches, led by vested clergy and acolytes lifting high the cross or crucifix, in December 2017, January and February 2018. The government banned these marches, even the church services beforehand, and deployed the Army's Republican Guard throughout the major cities, setting up roadblocks to deter movement on those Sundays; undeterred, the faithful attended Mass, and marched afterward. The Police violently repressed the first two marches, surrounding many parishes, firing teargas and even live

legislate-away racial hatred as such, even by constitutional amendment. Witness the United States which amended its own constitution to embrace universal *jus soli* nationality only after a long and brutal civil war,[578] and which spent another century in litigation over its meaning.[579] Hatred is born of division, and when racial division is institutionalized, the communities concerned have no chance over time to see themselves as one. As the martyred Rev. Dr. Martin Luther King, Jr., explained during the U.S. civil rights movement of the 1960's:

> Morality cannot be legislated, but behavior can be regulated.… The habits, if not the hearts, of people have been and are being altered every day by legislative acts, judicial decisions, and executive orders. Let us not be misled by those who argue that segregation cannot be ended by the force of law.[580]

Moreover, were the Congo to divorce itself from ethnicity as the touchstone of political identity, a concept implanted by European indirect rule,[581] it would more fully liberate itself from the legacy of its colonial past, and truly move forward.[582] The evils of tribalism will dog the

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ammunition into churchyards, killing at least eight worshipers on each occasion. Undaunted, the faithful continued to attend Mass and to march. At the third scheduled march, the government ordered the Police not to use violence; still, at least two were shot dead. Kabila and the ruling party eventually announced he would abide by the Constitution and organize elections in which he would not run. *See*, *e.g.*, Kristin Chick, *Fighting Authoritarianism, One Mass at a Time*, THE NEW REPUBLIC (Dec. 19, 2018), https://newrepublic. com/article/152576/fighting-authoritarianism-one-mass-time; *DR Congo: Repression Persists as Election Deadline Nears,* HUMAN RIGHTS WATCH (June 29, 2018, 5:30 AM), https://www.hrw. org/news/2018/06/29/dr-congo-repression-persists-election-deadline-nears#.

[578] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. 14, § 1, cl. 1 (1868). The sole exception is children born to those not "subject to the jurisdiction" of the United States, such as foreign diplomats on assignment to the United States.

[579] It took nearly a century of jurisprudence and legislative action following adoption of the Fourteenth Amendment to affirm that "all persons" means all persons, irrespective of racial or national origin. *See, e.g.,* United States v. Wong Kim Arc, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890 (1898) (a person born on U.S. soil to Chinese guest-worker parents is "subject to the jurisdiction" of the U.S. upon birth, hence a U.S. citizen for life, and cannot be denied re-entry to the U.S. after a temporary absence as an adult); *and* U.S. Immigration and Nationality Act § 311, Pub. L. 82–414, c. 477, Title III, ch.2, § 311, 66 Stat. 239, 8 U.S.C. § 1422 (1952) ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race…"). *See generally* T. ALEXANDER ALEINIKOFF ET AL., *supra* note 19.

[580] MARTIN LUTHER KING, JR., *On Being a Good Neighbor*, *in* STRENGTH TO LOVE 37 (Fortress Press ed., 1981) (1963) (selected sermons).

[581] *See supra* notes 95-101 and accompanying text.

[582] *See Jeremiah* 7:24 ("Yet they did not obey or incline their ear, but, in the stubbornness of their evil will, they walked in their own counsels, and looked backwards rather than forwards."). This is the message of the Gospel: to be freed from the always imperfect and often fallacious human interpretation of God's law. Does God *really* want

heels of the Congolese people for as long as Congolese law condones it.[583] Disempowering racial discrimination, by dismantling the law of nationality-by-ethnic-origin, will check ethnic hatred's slanderous tongue, and allow to be heard above its din the voices of those Congolese who fervently pray:

> Grant, O God, that your holy and life-giving Spirit may so move every human heart and especially the hearts of the people of the Democratic Republic of the Congo, that barriers which divide us may crumble, suspicions disappear, and hatreds cease; that our divisions being healed, we may live in justice and peace.[584]

# # #

us to practice genocide, enslave others, or for men to treat women as chattel or totems, which a strictly literal reading of some Old Testament passages would indicate? *See, e.g., Deuteronomy* 20:16-17, *Joshua* 6:20-21, *Psalms* 21:11, 106:34, & 137:9 (genocide); *Leviticus* 25:44-46, *Deuteronomy* 20:11 (slavery); *Deuteronomy* 20:14, *Ezra* 10:10-44 (women). As Paul instructed the incipient Church in Rome: "Christ is the end of the law so that there may be righteousness for everyone who believes;" thereby, "sin will have no dominion over you, since you are not under law but under grace." *Romans* 10:4 & 6:14.

[583] "Let not the slanderer be established in the land," "for the power of sin is the law." *Psalm* 140:11 & 1 *Corinthians* 15:56. As South African scholar Lars-Christopher Huening noted:

> Although the newspapers have greatly toned down their anti-Rwandophone rhetoric since the Congo wars, and profess to accept the Rwandophones' credentials as Congolese citizens, these popular narratives [of a Tutsi conspiracy to Balkanize the Congo] continue to flourish. They persist as potent resources available to Congolese political actors to further their interests by mobilizing populations along conflicting identity fault lines. Making use of the past in this vein, it appears, will remain instrumental to the DRC's political discourse…

Huening, *supra* note 6, at 29.

[584] Adapted from THE BOOK OF COMMON PRAYER 823 (1979).

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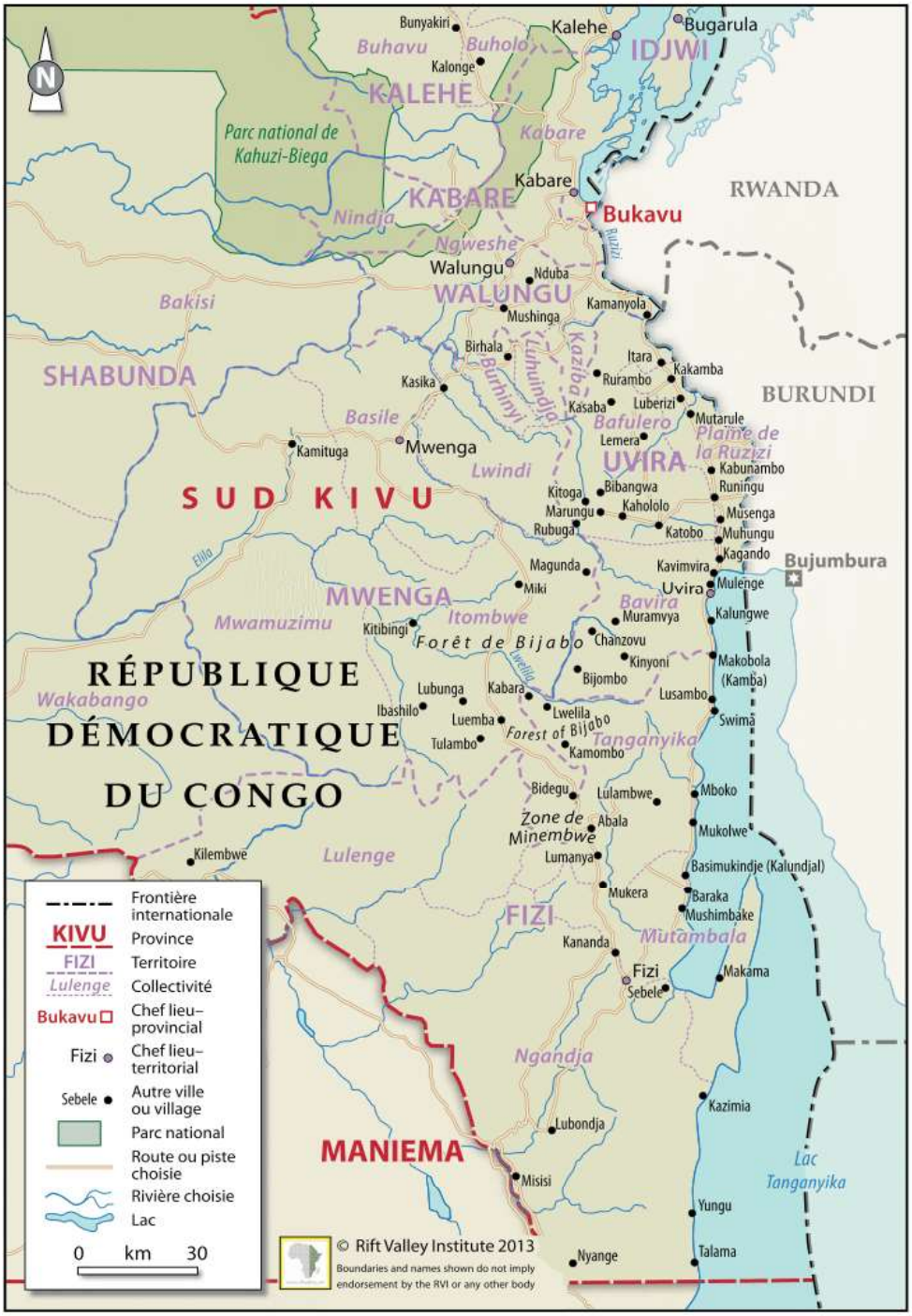
APPENDIX I
MAP OF SOUTH KIVU PROVINCE



DRC in Africa

SK Province in DRC

Carte 2. *Territoires, collectvités et principales villes du Sud-Kivu*

APPENDIX II

LITIGATION STRATEGY FLOW CHART

First Three Fora – Individual/NGO Petitioner

1st DRC Constitutional Court.

PREVAIL → Does the government comply?
YES → ✓
NO

NOT PREVAIL → State Party Champion?
YES → **CERD**
– *ideally by a non-African State Party*
NO → **African Commission**

2nd African Commission

PREVAIL → Does the government comply?
YES → ✓
NO

NOT PREVAIL → State Party Champion?
YES → **CERD**
or **African Court** *(Advisory Opinion)*
– *If CERD determination previously obtained*
NO → **Human Rights Committee**

3rd Human Rights Committee

PREVAIL → Does the government comply?
YES → ✓
NO

NOT PREVAIL → State Party Champion?
YES → **CERD**
NO → litigation exhausted

APPENDIX II

LITIGATION STRATEGY FLOW CHART (CONT.)

Last Three Fora – State Party Petitioner (SP)

4th CERD

PREVAIL → Does the government comply?
YES → ✓
NO → **African Commission**
– *if on appeal from Constitutional Court*
or **African Court** *(Advisory Opinion)*
– *if on appeal from African Commission or Human Rights Committee*

NOT PREVAIL → **Int'l Court of Justice**††(see below)

5th African Court

PREVAIL → Does the government comply?
YES → ✓
NO → **Int'l Court of Justice**

NOT PREVAIL → **Int'l Court of Justice**

6th Int'l Court of Justice

PREVAIL → Does the government comply?
YES → ✓
NO a) → diplomatic, economic, ecclesiastic pressure, referral to the U.N. Security Council.

†† b) If ICJ judgment is on direct appeal from CERD:
i) → **African Court** *(Enforcement Action, if SP is African)*
or ii) → **African Commission** *(if no African SP)*

APPENDIX III

PLEADING THE CAUSES OF ACTION IN THE DRC CONSTITUTIONAL COURT

1. International Convention on the Elimination of all Forms of Racial Discrimination

A. The DRC Constitution violates the ICERD.

Whereas the DRC acceded to the ICERD on April 21, 1976, as of which date its provisions became Congolese law with authority superior to all other laws;[585] and

Whereas articles 1(1) and 5(d)(iii) of the ICERD require the DRC to guarantee to everyone within its jurisdiction the right to nationality without distinction as to ethnic origin, and without preference based on ethnic origin in the attribution of nationality under Congolese law;[586] and

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law; [587] and

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution, in so far as it distinguishes on the basis of ethnic origin or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, violates ICERD articles 1(1) and 5(d)(iii);

Therefore, per article 2(1)(c) of the ICERD and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the Constitution so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

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[585] DRC CONST. art. 215 (text at note 127, *supra*).
[586] ICERD arts. 1(1) and 5(d)(iii) (text accompanying notes 144 & 156, *supra*).
[587] DRC CONST. art 10 (text at note 20, *supra*).

B. The DRC Nationality Law Violates the ICERD.

Whereas the DRC acceded to the ICERD on April 21, 1976, as of which date its provisions became Congolese law with authority superior to all other laws;[588] and

Whereas articles 1(1) and 5(d)(iii) of the ICERD require the DRC to guarantee to everyone within its jurisdiction the right to nationality without distinction as to ethnic origin, and without preference based on ethnic origin in the attribution of nationality under Congolese law;[589] and

Whereas article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality[590] defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law; and

Whereas article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality, in so far as it distinguishes on the basis of ethnic origin or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, violates ICERD articles 1(1) and 5(d)(iii);

Therefore, per article 2(1)(c) of the ICERD and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

2. International Covenant on Civil and Political Rights.

A. The Right to Nationality

1) The DRC Constitution violates the Right to Nationality under the ICCPR

Whereas the DRC acceded to the ICCPR on November 1, 1976, as of which date its provisions became Congolese law with authority superior to all other laws;[591] and

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[588] DRC CONST. art. 215 (text at note 127, *supra*).
[589] ICERD arts. 1(1) and 5(d)(iii) (text accompanying notes 144 & 156, *supra*).
[590] 45 JOURNAL OFFICIEL RÉP. DÉM. CONGO, n° spécial [45 OFFICIAL GAZETTE DEM. REP. CONGO, special issue], Nov. 17, 2004.
[591] DRC CONST. art. 215 (text at note 127, *supra*).

Whereas articles 16 and 26 of the ICCPR oblige the DRC to guarantee the right to nationality to all persons within its jurisdiction without any discrimination on the basis of ethnic origin;[592] and

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law;[593] and

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution, in so far as it distinguishes on the basis of ethnic origin or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, violates ICCPR articles 16 and 26 by discriminating on the basis of ethnic origin;

Therefore, per article 2(2) of the ICCPR and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the Constitution so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

2) *The DRC Nationality Law Violates the Right to Nationality under the ICCPR*

Whereas the DRC acceded to the ICCPR on November 1, 1976, as of which date its provisions became Congolese law with authority superior to all other laws;[594] and

Whereas articles 16 and 26 of the ICCPR oblige the DRC to guarantee the right to nationality to all persons within its jurisdiction without any discrimination on the basis of ethnic origin;[595] and

Whereas article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality[596] defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law; and

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[592] ICCPR arts. 16 & 26 (*see* text accompanying notes 220-223 & 239-256, *supra*).
[593] DRC CONST. art 10 (text at note 20, *supra*).
[594] DRC CONST. art. 215 (text at note 127, *supra*).
[595] ICCPR arts. 16 & 26 (*see* text accompanying notes 220-223 & 239-256, *supra*).
[596] 45 JOURNAL OFFICIEL RÉP. DÉM. CONGO, n° spécial [45 OFFICIAL GAZETTE DEM. REP. CONGO, special issue], Nov. 17, 2004.

Whereas article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality, in so far as it distinguishes on the basis of ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, violates ICCPR articles 16 and 26 by discriminating on the basis of ethnic origin;

Therefore, per article 2(2) of the ICCPR and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

B. The Right to Life

1) The DRC Constitution violates the Right to Life under the ICCPR.

Whereas the DRC acceded to the ICCPR on November 1, 1976, as of which date its provisions became Congolese law with authority superior to all other laws;[597] and

Whereas article 6(1) of the ICCPR obliges the DRC to guarantee the right to life to all persons within its jurisdiction, which right includes the right to enjoy a life with dignity, and that security in one's nationality is a basic element of human dignity;[598] and

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law;[599] and

Whereas the history of the Congo since independence is replete with instances of the State, or persons purporting either to represent or to influence the State, having either denied, withdrawn or called into question the Congolese nationality of persons and peoples, notably the Banyamulenge, on the basis of their membership *vel non* in an ethnic group; [600] and

Whereas, as long as "nationality by origin" is defined in terms of or with refence to ethnic origin, members of ethnic groups which, due to their ethnic origin, have been denied or have had their

[597] DRC CONST. art. 215 (text at note 127, *supra*).
[598] ICCPR art. 6(1); Penessis v. Tanzania, Afr. Ct. Hum. Peoples' Rts. (2019); Hum. Rts. Comm., Gen. Comment No. 36 (2018) (*see* text accompanying notes 258-260 & 262, *supra*).
[599] DRC CONST. art 10 (text at note 20, *supra*).
[600] *See, e.g., supra* notes 44-46, 79, 93, 267.

Congolese nationality withdrawn or called into question, cannot feel secure in their nationality; and

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution, in so far as it defines "nationality by origin" with reference to ethnic origin or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, undermines the dignity of those persons and peoples who, due to their ethnic origins, have in the past been denied or have had their Congolese nationality withdrawn or called into question, and thus violates ICCPR article 6(1);

Therefore, per article 2(2) of the ICCPR and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the Constitution so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

2) *The DRC Nationality Law Violates the Right to Life under the ICCPR.*

Whereas the DRC acceded to the ICCPR on November 1, 1976, as of which date its provisions became Congolese law with authority superior to all other laws;[601] and

Whereas article 6(1) of the ICCPR obliges the DRC to guarantee the right to life to all persons, which includes the right to enjoy a life with dignity, and that security in one's nationality is a basic element of human dignity;[602] and

Whereas article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality[603] defines Congolese "nationality by origin" in terms of and with reference to ethnic origin, or creates a preference based on ethnic origin in the attribution of nationality under Congolese law; and

Whereas the history of the Congo since independence is replete with instances of the State, or persons purporting either to represent or to influence the State, having either denied, withdrawn or called into question the Congolese nationality of persons and peoples, notably the

[601] DRC CONST. art. 215 (text at note 127, *supra*).
[602] ICCPR art. 6(1); Penessis v. Tanzania, Afr. Ct. Hum. Peoples' Rts. (2019); Hum. Rts. Comm., Gen. Comment No. 36 (2018) (*see* text accompanying notes 258-260 & 262, *supra*).
[603] 45 JOURNAL OFFICIEL RÉP. DÉM. CONGO, n° spécial [45 OFFICIAL GAZETTE DEM. REP. CONGO, special issue], Nov. 17, 2004.

Banyamulenge, on the basis of their membership *vel non* in an ethnic group;[604] and

Whereas, as long as "nationality by origin" is defined in terms of or with refence to ethnic origin, members of ethnic groups which, due to their ethnic origin, have been denied or have had their Congolese nationality withdrawn or called into question, cannot feel secure in their nationality; and

Whereas article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality, in so far as it defines "nationality by origin" with reference to ethnic origin or creates a preference based on ethnic origin in the attribution of nationality under Congolese law, undermines the dignity of those persons and peoples who, due to their ethnic origins, have in the past been denied or have had their Congolese nationality withdrawn or called into question, and thus violates ICCPR article 6(1);

Therefore, per article 2(2) of the ICCPR and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality so as not to define "nationality by origin" on the basis of or with reference to ethnic origin.

3. The African Charter on Human and Peoples' Rights

A. The DRC Constitution violates the African Charter

Whereas the DRC ratified the African Charter on July 28, 1987, as of which date its provisions became Congolese law with authority superior to all other laws;[605] and

Whereas the African Charter (a) guarantees the right to nationality through its article 5,[606] (b) obliges the DRC, through article 1, to undertake to adopt legislative or other measures to give effect to that right[607] and, (c) per article 2, in so doing not to make any kind of distinction on the basis of ethnic group;[608] and

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[604] *See, e.g., supra* notes 44-46, 79, 93, 267.
[605] DRC CONST. art. 215 (text at note 127, *supra*).
[606] Afr. Charter arts. 5, 60 & 61 and Afr. Ct. & Comm'n. jurisprudence (*see* text accompanying notes 271-273, 282, 295-298, 306-309, *supra*).
[607] Afr. Charter art. 1 (text at note 316, *supra*).
[608] Afr. Charter art. 2 (text at note 275, *supra*).

Whereas article 10, paragraph 2, clause 2, of the DRC Constitution adopted on February 18, 2006, defines Congolese "nationality by origin" in terms of and with reference to ethnic group, or creates a preference based on ethnic group in the attribution of nationality under Congolese law; and

Whereas (a) article 10, paragraph 2, clause 2, of the DRC Constitution distinguishes on the basis of ethnic group in its giving effect to the right of nationality, and (b) thereby violates article 2 of the African Charter;

Therefore, per article 1 of the African Charter and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 10, paragraph 2, clause 2, of the Constitution so as not to define "nationality by origin" on the basis of or with reference to ethnic group.

B. The DRC Nationality Law Violates the African Charter

Whereas the DRC ratified the African Charter on July 28, 1987, as of which date its provisions became Congolese law with authority superior to all other laws;[609] and

Whereas the African Charter (a) guarantees the right to nationality through its article 5,[610] (b) obliges the DRC, through article 1, to undertake to adopt legislative or other measures to give effect to that right[611] and, (c) per article 2, in so doing not to make any kind of distinction on the basis of ethnic group;[612] and

Whereas article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality[613] defines Congolese "nationality by origin" in terms of and with reference to ethnic group, or creates a preference based on ethnic group in the attribution of nationality under Congolese law; and

Whereas (a) article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality distinguishes on the basis of ethnic group in its giving effect to the right of nationality, and (b) thereby violates article 2 of the African Charter;

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[609] DRC CONST. art. 215 (text at note 127, *supra*).
[610] Afr. Charter arts. 5, 60 & 61 and Afr. Ct. & Comm'n. jurisprudence (*see* text accompanying notes 271-273, 282, 295-298, 306-309, *supra*).
[611] Afr. Charter art. 1 (text at note 316, *supra*).
[612] Afr. Charter art. 2 (text at note 275, *supra*).
[613] 45 JOURNAL OFFICIEL RÉP. DÉM. CONGO, n° spécial [45 OFFICIAL GAZETTE DEM. REP. CONGO, special issue], Nov. 17, 2004.

Therefore, per article 1 of the African Charter and article 216 of the DRC Constitution, the DRC is obligated to amend, rescind or nullify article 6 of Law No. 04/024 of November 12, 2004 relating to Congolese Nationality so as not to define "nationality by origin" on the basis of or with reference to ethnic group.

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